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## RAILROAD RETIREMENT PENSION ACT OF 1934

At the close of its last session, Congress passed the Railroad Retirement Act,<sup>1</sup> which is the first government attempt in the United States to compel private employers and employees to contribute jointly to the support of persons who have become too old to continue profitably and safely to serve their employers.<sup>2</sup> The problem of superannuation thus in part attacked has been aggravated by the industrial era and its accompanying changes. The life span of individuals has been increased by medical advances.<sup>3</sup> At the same time the

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1. 48 STAT. c. 868, 45 U. S. C. A. § 201-214 (1934).

2. The employer will assume two-thirds, and the employees one-third of the cost of the retirement fund set up by the Act. The age limit is set at 65, subject to change upon mutual agreement of employer and employee.

In practically every compulsory old-age insurance plan adopted by foreign nations, pensionable age has been set at 65. Studies and Reports of the International Labour Office, Series M, *Compulsory Pension Insurance* (1933) 15. Competent investigation in the United States has determined the average of "partial impairment" of earning power to be 65. EPSTEIN, *CHALLENGE OF THE AGED* (1928) 14-31; cf. 1 LATIMER, *INDUSTRIAL PENSION SYSTEMS* (Ind. Rel. Couns. 1933) 99-101. (Mr. Latimer is now chairman of the Railroad Retirement Board, set up under the Act.)

3. EPSTEIN, op. cit. *supra* note 2, at 14-16; LATIMER, op. cit. *supra* note 2, at 170-179. "In 1855 average life expectancy was 40; now it is 58, which means that many more workers reach the age of possible dependency." CUMMINS, *THE LABOR PROBLEM IN THE*

increasingly rigorous demands of industry on the mind and body of the workman has decreased the span of the employment career.<sup>4</sup> Furthermore, the long-run effect of technological progress has been to decrease the permanency of employment as well as the possibility of reemployment.<sup>5</sup> The cumulative result is an ever-growing group of persons who are unable, because of age, to retain or obtain industrial employment. Meanwhile the possibilities of support for this group have been diminished. The shortened working span has decreased the period during which savings could be set aside; the increased life span has lengthened the period for which provision is to be made. Returns per unit of labor have generally failed to provide a very large part of the working population with more than a minimum of subsistence.<sup>6</sup> Increased urbanization and consequent decreased cohesiveness of the family unit has brought about a correlative decrease in the probability of family support for the aged,<sup>7</sup> accentuated

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UNITED STATES (N. Y. 1932) 105-6. See also DAUGHERTY, *LABOR PROBLEMS IN AMERICAN INDUSTRY* (1933) 148. For percentages of age groups, see *PENSIONS: FUNDAMENTALS IN THE DEVELOPMENT OF PENSION AND OTHER RETIREMENT PLANS* (Dep't of Manufacture, U. S. C. of C., 1929) 10.

4. EPSTEIN, *op. cit. supra* note 3, at 4-31; 2 LATIMER, *op. cit. supra* note 2, at 833-837; Polakov, *Power as a Factor in Economic Readjustments* (1933) 165 *ANNALS* 30, 32; *Hearings Before the Senate Committee on Education and Labor on S. Res. 219*, 70th Cong., 2d Sess. (1929) 72, 113-115, 128. The period from 1890 to 1920 showed a decrease of 13.7% in per centum of males 65 and over gainfully employed. CUMMINS *op. cit. supra* note 3, at 109; Cf. McAfee, *Middle-Aged White-Collar Workers on the Economic Rack* (1931) 154 *ANNALS* 32; *SOCIAL SECURITY IN THE UNITED STATES* (American Ass'n for Soc. Sec., Inc., 1933) 25-6.

Industrial civilization has tended to increase the amount of illness and accident among the working class, thus hastening the infirmities of age and increasing old age dependency. *Id.* at 108; EPSTEIN, *op. cit. supra* note 2, at 65-72.

5. In general, Epstein, *Do we need Compulsory Public Employment Insurance?* *Yes* (1933) 170 *ANNALS* 21, 26; DAUGHERTY, *op. cit. supra* note 3, at 105. The evidence "leads to the belief that the older workers" (i.e. over 46) do not "secure new jobs as easily as" do "the younger." *THE ABSORPTION OF THE UNEMPLOYED BY AMERICAN INDUSTRY* (The Brookings Institution Pamph. Series, Vol. 1, No. 3, 1929) 13-14, 18. "The so-called absorption of labor displaced by machinery has not been as great as the lay-off," Scheler, *Technological unemployment* (1931) 154 *ANNALS* 17, 25, 26.

For a pertinent analysis as to the railroad industry in the United States, see Witt Bowden, *Productivity of Labor and Industry*, Part 3, *Transportation Employees* (1934) 38 *MONTHLY LAB. REV.* 269-288.

6. DAUGHERTY, *op. cit. supra* note 3, at 104, 169-205; EPSTEIN, *op. cit. supra* note 2, at 88-112. Daugherty points out that "Actually . . . wages of about half the workers are not high enough to permit them to reproduce themselves, maintain themselves in physical and mental health, and build up a fund for old age." DAUGHERTY, *op. cit. supra* note 3, at 149. Cummins comes to a similar conclusion, after an exhaustive survey of competent authority from 1850 to 1932, and taking into consideration the rise in standard of living in determining the worker's condition. CUMMINS, *op. cit. supra* note 3, at 126-136; see Murphy, *Dependency in Old Age* (1931) 154 *ANNALS* 38, 41. But cf. *THE SUPPORT OF THE AGED: A REVIEW OF CONDITIONS AND PROPOSALS* (Nat'l Ind. Conference Board, 1931) 9-17.

7. EPSTEIN *op. cit. supra* note 2, at 10; cf. *PENSIONS—FUNDAMENTALS IN THE DEVELOPMENT OF PENSION AND OTHER RETIREMENT PLANS* (Dep't of Manufacture, U. S. C. of C., 1929) 13.

by the increasing disproportion between the older and younger age groups due to a declining birth rate.<sup>8</sup> Consequently, there is a large and growing number of aged dependent persons for whom no provision has been made.<sup>9</sup>

Solution of this problem has progressed further in European countries than in the United States, due in part to the fact that the industrialization process reached its maturity earlier in those countries.<sup>10</sup> Beginning with the second quarter of the nineteenth century, industrial employees banded together in mutual benefit societies—established in part for the purpose of providing old-age pensions for their members. Their growth, however, was limited by the low level and precarious nature of the average member's earnings, and by the fact that their comparatively small and fluctuating membership made accurate prediction of future pension burdens impossible. Only where the membership was limited to the employees of a stabilized and prosperous industry, or in the comparatively rare instances where the employer in such an industry supplemented the society's funds with his own substantial contributions, were such attempts successful.<sup>11</sup> Consequently, the various governments were soon forced to provide supplements and substitutes for these private attempts. There was first an effort to meet the problem by liberalizing the already existing poor relief laws. Little progress was thus made, however, since such relief at best

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8. EPSTEIN, *op. cit. supra* note 2, at 15-16; Studies and Reports of the International Labour Office, Series M, *Non-contributory Pensions* (1933) 15. While in 1870, 3% of the population of the United States was 65, and over; 4.1% was the figure for 1900; and 5% for 1930 (5,500,000 persons) FIFTEENTH CENSUS OF THE UNITED STATES, VOL. 3, *Population* (U. S. Bur. of the Census, 1930) 576; cf. LATIMER, *op. cit. supra* note 2, at 17.

9. In general, see *Hearing Before a Subcommittee of the Committee on Pensions on S. 3257*, 71st Cong., 3d Sess. (1931) 27, 105; *Hearing Before the Committee on Pensions on S. 3037*, 72d Cong., 1st Sess. (1932) 5; 78 Cong. Rec., June 13, 1934, at 11806, 11810; Brennan, *Old Age Pension Legislation* (1932) 7 NOTRE DAME LAWYER 433, 434; Denby, *Do we need State Old Age Pensions? Yes* (1933) 170 ANNALS 93, 94-5; EPSTEIN, *op. cit. supra* note 2, at 48-53; SOCIAL SECURITY IN THE UNITED STATES (American Ass'n for Soc. Sec., Inc., 1933) 20-28. It was estimated in 1915 that approximately 1,250,000 persons, 65 or over, depended upon public and private charity. SQUIER, *OLD AGE DEPENDENCY IN THE UNITED STATES* (1912). It is estimated that there are at present at least several million superannuated Americans, 65 years of age or over, who lack adequate support. N. Y. Times, September 2, 1934 II, at 1, col. 4; N. Y. Times, Sept. 30, 1934, at 1, col. 7.

10. EPSTEIN, *op. cit. supra* note 2, at 293-8; Studies and Reports of the International Labour Office, *supra* note 8, at 5; cf. STUDENSKY, *THE PENSION PROBLEM AND THE PHILOSOPHY OF CONTRIBUTIONS* (N. Y. Bur. of Mun. Research, 1917) 12-13.

11. Studies and Reports of the International Labour Office, *supra* note 2, at 5-6; Studies and Reports of the International Labour Office, *supra* note 8, at 1-3; EPSTEIN, *op. cit. supra* note 2, at 294-5; SOCIAL SECURITY IN THE UNITED STATES (American Ass'n for Soc. Sec., Inc., 1933) 68-69.

At least as early as 1818, there were also private charities organized in England for the purpose of pensioning superannuated industrial workers, or their widows. One, organized in that year, stated that its objects were to discourage pauperism and "to sustain that virtuous spirit of independence" of those "who have survived every ability to aid themselves" and "for whom no provision has been made..." CITY OF LONDON GENERAL PENSION SOCIETY FOR THE PERMANENT RELIEF OF DECAYED ARTIZANS AND THEIR WIDOWS (Pamphlet published in London, 1824).

provided inadequate financial aid having no relation to the applicant's former standard of living and was associated with the traditional stigma attached to pauper relief. This effort was shortly followed by government subsidization of the private mutual benefit societies and other voluntary thrift systems. The latter program was only partially successful, for the wage scale of the average worker hardly afforded a living, let alone provision for future security.<sup>12</sup> There followed, in some countries, compulsory provision for workers in hazardous and large-scale industries such as railroads.<sup>13</sup> In fifteen countries similar provision has been made for employees in all industries,<sup>14</sup> supplemented in some instances by pensions for individuals not covered by the industrial systems.<sup>15</sup> Similar lines of development have taken place more recently in the Latin-American, Australasian and African countries closely affiliated with Europe by cultural and political ties.<sup>16</sup> By compelling employers to contribute to the support of the pension systems, forty-seven countries implicitly assert that industry has a public responsibility to share the burdens arising from industrial superannuation. Employees in forty-eight countries, and the governments of thirty-eight also contribute.<sup>17</sup> In all these countries, the introduction of com-

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12. Studies and Reports of the International Labour Office, both cited in note 11, *supra*; EPSTEIN, op. cit. *supra* note 2, at 295. Government subsidy of private systems is still found in six countries, including Canada, France and Japan. DAUGHERTY, op. cit. *supra* note 3, at 861.

13. Studies and Reports of the International Labour Office, *supra* note 2, at 6-10, 12. This category includes workers in other transport industries such as shipping and mining. France had pension legislation for seamen as early as 1791, Belgium by 1844, Italy by 1861.

14. Id. at 12.

15. *Hearing Before the Committee on Pensions on S. 3037*, 72d Cong., 1st Sess. (1932) 41. Sweden and several of the Swiss cantons extend compulsory national pension insurance to all persons, requiring contributions from age 16, as in Sweden, to the time of retirement. Studies and Reports of the International Labour Office, *supra* note 2, at 6-10, 128. In nearly every instance, separate systems of protection, for individuals not covered by the compulsory pension insurance systems are being absorbed into the latter. Id. at 2-4. Straight noncontributory pension systems supported out of the public treasury are still found in ten countries, including Great Britain and France. DAUGHERTY, op. cit. *supra* note 3, at 362.

16. Studies and Reports of the International Labour Office, *supra* note 2, at 6-10. An estimated 95,000,000 persons are now covered by compulsory old-age pension insurance systems of the various nations. This does not include several schemes for which statistics are not available, and special schemes for seamen, railway workers, public officials and public utility employees. Id. at 10. The principle of compulsory national old age insurance is now accepted by some thirty nations. Most of these pension systems include protection against the risks of invalidism and death, as well as old age. Studies and Reports of the International Labour Office, *supra* note 8, at 3.

Arguments against the compulsory national pension insurance systems have taken the following principal forms: (a) that such systems include a very large number of persons who are improvident, or are not in need of pensions; (b) that they result in the withdrawal of a large amount of capital from its proper destiny in industrial enterprise. Id. at 126-128. The International Labour Office study concludes that it "is almost universally agreed today that the modern state is entitled and obliged, in the public interest, to make insurance compulsory." Studies and Reports of the International Labour Office, *supra* note 2, at 5-6.

17. Studies and Reports of the International Labour Office, *supra* note 2, at 448-9. For a competent analysis of the developments in foreign countries, with citation to statutory

pulsory old age pension systems and consequent prevention of abject poverty in old age have been accompanied by material reduction in disease and increase in longevity among the working classes.<sup>18</sup>

Although like problems are presented in the United States, progress toward solution is less advanced.<sup>19</sup> Only as to government employees is there fairly adequate provision for old-age security.<sup>20</sup> Provision for the public exists in twenty-eight states,<sup>21</sup> but it is restricted to inadequate attempts to provide

sources, see United States Bureau of Labor Statistics Doc. No. 561, *Public Old Age Pensions and Insurance in the United States and in Foreign Countries* (1932) 93, et seq.; cf. ERSTEIN, op. cit. *supra* note 2, at 293, et seq.

18. Studies and Reports of the International Labour Office, *supra* note 2, at 382-429; *Progress in Germany* (1930) 4 OLD AGE SECURITY HERALD 1, 11.

19. It is estimated that 6,289,672 Americans were covered by, and 178,567 persons actually on the rolls of pension systems of all classes except war pension systems, in 1928-9. This includes government employees, Carnegie Fund beneficiaries, Y. M. C. A. and Y. W. C. A. secretaries, ministers, beneficiaries of trade union and private industrial systems. THE SUPPORT OF THE AGED: A REVIEW OF CONDITIONS AND PROPOSALS (Nat'l Ind. Conference Board 1931) 25.

20. About half the states have adopted plans for their own employees and for teachers, while practically every large municipality has provided for policemen, firemen, teachers, or others. DAUGHERTY, op. cit. *supra* note 3, at 865. While the municipal employee pension movement began as early as 1857, that as to state employees began in 1911. U. S. Bureau of Labor Statistics, *Bull.* No. 477 (1929) 1-2, 9; BUCK, MUNICIPAL PENSIONS AND PENSION FUNDS (1916) 2. State and federal pensions for judges have been in existence, at least since 1869. See *De Wolf v. Bowley*, 355 Ill. 530, 533-4, 189 N. E. 893, 894-5 (1934). The federal government established a retirement pension plan for its own civil service employees in 1920. 41 STAT. 614 (1920), 5 U. S. C. A. §§ 691-9 (1929). It later extended the Act to employees of the Panama Canal and Panama Railroad Company. 46 STAT. 1471 (1931), 25 U. S. C. A. § 409a (1933). It has also provided for employees of the District of Columbia, 41 STAT. 614 (1920), 5 U. S. C. A. § 693 (1927); 39 STAT. 718 (1916), 20 D. C. Code §§ 581-593 (1930). Recently, a Federal Reserve Bank pension system has been proposed, to be established on principles of compulsory contribution essentially similar to those now embodied in the Railroad Retirement Pension Act. The proposal was to make the plan compulsory on officers and employees of the twelve Federal Reserve banks, and optional with member banks. Senate Report No. 751, to accompany S. 3657, 69th Cong., 1st. Sess. (1926); 1 LATIMER, op. cit. *supra* note 2, at 37-9; 2 *id.* at 1168-9.

21. CAL. GEN. LAWS (Deering, 1932) Act 5846; Colo. Laws, 1933, c. 144; Del. Laws, 1931, c. 85; IDAHO CODE ANN. (1932) §§ 30-3101 to 30-3125; Ind. Acts 1933, c. 36; Iowa Acts, Extra Session 1933-34, c. 19; Ky. Acts, 1934, c. 59; Me. Laws, 1933, c. 267; Md. Laws, 1931 c. 114, as supplemented by Md. Laws, Special Session 1933, c. 51; MASS. GEN. LAWS (1932) c. 118A; MICH. COMP. LAWS (Mason's Supp., 1933) §§ 8309-1 to 8309-42; Minn. Laws, 1929, c. 47, as amended by Minn. Laws, 1931, c. 72, 138, as amended by Minn. Laws, 1933, c. 348; MONT. REV. CODE ANN. (Choate, Supp. 1923-27) §§ 4541.1 to 4541.25; NEB. COMP. STAT. (Supp. 1933) §§ 68-201 to 68-227; NEV. COMP. LAWS (Hillyer, 1929) §§ 5109-5136; N. J., Stat. Service 1931, §§ 155-50 to 155-77; N. Y. CONSOL. LAWS (Cahill, 1930) c. 49½, §§ 122 to 122-p; N. D. Laws, 1933, c. 254; OHIO GEN. CODE (Page, 1934) §§ 1359.1 to 1359-30; Ore. Laws, 1933, c. 284; Pa. Laws, Extra Sess. 1933-34, p. 282; UTAH REV. STAT. ANN. (1933) §§ 19-12-1 to 19-12-18; Wash. Laws, 1933, c. 29; WIS. STAT. (1931) §§ 49.20 to 49.39, as amended by Wis. Laws, 1933, c. 375; WYO. REV. STAT. ANN. (Courtright, 1931) §§ 84-201 to 84-225. According to *Progress in the Making of the Social Legislation Maps* (1934) 24 AM.

meagre straight pension grants from the public treasury for the "pauper" aged.<sup>22</sup> An attempt of Massachusetts to solve the problem by sponsoring voluntary old-age insurance and savings, analogous to the earlier attempts in Europe, met with scant success.<sup>23</sup> Regulation of private pension systems, existing in at least six states, has been desultory.<sup>24</sup> For the most part, solution of the prob-

LAB. LEG. REV. 116-117, old age pension laws are now also in effect in Arizona, New Hampshire, and West Virginia. The territories of Alaska and Hawaii also have such legislation. Alaska Laws, 1915, c. 65; Hawaii Laws, 1933, Act 203.

Several state statutes of this type have been held in conflict with state constitutions, either on the grounds that they sought to do more than provide for "paupers", or that they were in reality providing "gratuities" to private citizens. In re Opinion of the Justices, 78 N. H. 617, 100 Atl. 49 (1917); *Busser v. Snyder*, 282 Pa. 440, 128 Atl. 80 (1925); cf. *Board of Control of the State of Arizona v. Buckstegge*, 18 Ariz. 277, 158 Pac. 837 (1916). All three states, however, now have old-age pension systems.

22. While such systems now exist in twenty-eight states, pensions were actually being paid in only sixteen states (and the territory of Alaska) at the end of 1933, assisting only 115,547 persons in all, at an annual cost of \$25,950,248, or an average monthly pension of \$18.71. This is a drop of \$5.97 in value of average monthly pension since 1931. There is growing difficulty with regard to funds, especially in the states where the county bears the whole cost. N. Y. Times, Sept. 30, 1934, at 1 col. 7. But cf. *SOCIAL SECURITY IN THE UNITED STATES* (American Ass'n for Social Security, Inc., N. Y. 1933) 5, 121-4; United States Bureau of Labor Statistics, *supra* note 17, at 2.

The typical state systems fix age of eligibility at 65 or 70, the more recent plans favoring the former; require possession of citizenship and 10-20 years residence in the state; require that the applicant have no more than \$3000 in property and be without means of support. Benefits are usually administered by local authorities and limited to a maximum of \$1 per day, or \$30 per month. *DAUGHERTY*, op. cit. *supra* note 3, at 864; United States Bureau of Labor Statistics, op. cit. *supra*; United States Bureau of Labor Statistics, Bull. No. 439 (1929) 68-85; *Analysis of Old Age Pension Bills Presented in 34 State Legislatures* (1933) 7 OLD AGE SECURITY HERALD 6, 9.

At least since 1911, there has been a persistent attempt to compel universalization and standardization of state old-age pension systems by means of a federal grant-in-aid to the states. Up to 1929, over 50 bills and resolutions on the subject had been introduced in one or the other house of Congress, but none had ever been reported out of committee. Since then, S. 3037, the Dill-Connery Bill, providing for a \$10,000,000 grant-in-aid to the states conforming their pension plans to a uniform pattern fixed in the Bill, was favorably reported out of the Senate Committee on Pensions. (1933) 7 OLD AGE SECURITY HERALD 1. See also *EPSTEIN*, op. cit. *supra* note 2, at 259-262; *SOCIAL SECURITY IN THE UNITED STATES* (American Ass'n for Soc. Sec., Inc., 1933) 7; *Hearing Before the Committee on Pensions on S. 3037*, 72nd Cong., 1st Sess. (1932); *Hearing Before a Subcommittee on Pensions on S. 3257*, 71st Cong., 3d Sess. (1931); Fillman, *Old Age Pension Legislation* (1931) 17 AM. BAR ASS'N. JOUR. 438.

23. *EPSTEIN*, op. cit. *supra* note 2, at 159, 209-10; United States Bureau of Labor Statistics, op. cit. *supra* note 17, at 1.

24. Three states have provided some form of regulation of private contributory pension systems through their insurance commissioners. MASS. ANN. LAWS (Lawyer's Co-op, 1932) c. 32, §§ 39-41; Minn. Laws, 1919, c. 388, §§ 1-3; N. Y. CONSOL. LAWS (Cahill, 1930) c. 30, § 299 (1-8). Two states authorize stock corporations under certain conditions to pension employees. Only New Jersey provides the safeguard that in case of revocation of such plans, "any moneys contributed by employees" be returned to them. N. J. LAWS, 1920, c. 175, § 1 (c) 3; PA. STAT. ANN. (Purdon, 1930) tit. 15, § 651. One state specifically empowers em-

lem has been left with private industry. Yet the present attempts of private industry are entirely inadequate to deal with the problem; and its ability adequately to do so in the future is highly improbable.<sup>25</sup>

The inadequacy of the private pension plans is shown, first, by the fact that competitive forces limit their scope primarily to the employees of large-scale industries.<sup>26</sup> Competitive forces make it unlikely that an industry would establish such a plan, unless it could thereby realize a gain. Gain could be achieved through four principal sources: elimination of inefficiency due to age; the improvement of employee morale as a result of the increase in employee advancement opportunities and the betterment of the employee's prospects for old age; prevention of an unfavorable public reaction likely to result from uncompensated dismissal of aged and faithful employees; and acquisition of increased power over labor by virtue of the pension reward to be given or withheld in the discretion of the employer.<sup>27</sup> Only large-scale industrial units,

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ployers to take out group old-age insurance annuities for employees. FLA. REV. GEN. STAT. (1920) § 4268. Two states authorize their savings banks, under certain restrictions to establish pension systems. N. J. COMP. STAT. (1910) p. 4714, § 69a; N. Y. CONSOL. LAWS (Cahill, 1930) c. 3, § 271. New York provides similarly as to savings and loan associations. N. Y. CONSOL. LAWS (Cahill, 1930) c. 3, § 409-a. Pennsylvania and New York make similar provisions as to insurance companies. N. Y. CONSOL. LAWS (Cahill, 1930) c. 30, § 98; PA. STAT. ANN. (Purdon, 1930) tit. 40, § 439. Cf. OHIO GEN. CODE (1910) § 1012; see LATIMER, *op. cit. supra* note 2, at 441, 672-4.

25. Recently, outstanding industrialists have come to similar conclusions. Gerard Swope suggested remedial measures by incorporation of pension systems in his scheme of industrial self-government by trade associations, under federal supervision, *FREDERICK, THE SWOPE PLAN* (1931) 31-37. The Pension Committee of the New York Building Congress made up of leading New York companies, suggested in 1932 that a compulsory system, supported by the contributions of the state, the employer and employee, as in thirty-two foreign countries, be substituted. Editorial, *New York Building Congress Group Urges Extension of Old Age Security* (1932) 6 OLD AGE SECURITY HERALD 1; 2 LATIMER, *op. cit. supra* note 2, at 880-881. Recent suggestions that provisions for pensions be incorporated in the NRA codes met with the disfavor of social workers in the field of old age security, on the ground that such codes are too temporary and uncertain. *The NRA and Social Security* (1933) 7 SOCIAL SECURITY 2.

26. "Over four-fifths of those . . . protected are employed by the railroads and in public utility, iron and steel, petroleum, and electrical apparatus and supplies industries." LATIMER, *op. cit. supra* note 2, at 41, 54-59. See also 2 *id.* at 945; *THE SUPPORT OF THE AGED: A REVIEW OF CONDITIONS AND PROPOSALS* (Natl. Ind. Conf. Bd., 1931) 32; Denby Jr. *supra* note 54, at 98. Well over 90% of employees covered by industrial pensions are in industries with more than one thousand employees. LATIMER, *op. cit. supra* note 2, at 57. The 87 largest corporations in the United States, running less than 26% of the company-operated plans, employed approximately 84.7% of all employees covered by pension plans in "industrials," railroads, and public utilities. LATIMER, *op. cit. supra* note 2, at 58.

27. *Hearing Before a Subcommittee of the Committee on Pensions on S. 3257, supra* note 22, at 5, 11; *Hearings Before a Subcommittee on Interstate Commerce on S. 3892 and S. 4646*, 73d Cong., 2d Sess. (1933) 24; SEN. DOC. NO. 140, 70th Cong., 1st Sess. (1928) 130; *PENSIONS—FUNDAMENTALS IN THE DEVELOPMENT OF PENSIONS AND OTHER RETIREMENT PLANS* (Dep't of Manufacture, U. S. C. of C., 1929) 25-28; *ELEMENTS OF INDUSTRIAL PENSION PLANS*. (Nat'l Industrial Conference Board, 1931) 2-10; CONANT, *A CRITICAL ANALYSIS OF INDUSTRIAL PENSION SYSTEMS* (1922) 4-45; EPSTEIN, *op. cit. supra* note 2, at 164; 2 LATIMER, *op. cit. supra* note 2, at 749-789; 1 *id.* at 18-20; Bureau of Labor Statistics Bulletin

for the most part, can, by reason of volume of operations and employment, reduce the pension cost per unit of operations to a point below the value of these gains. In manufacturing, such units include a little more than half the total workers in the United States.<sup>28</sup> If this is typical of all industry, private pension systems in 1932 covered scarcely thirty per cent of the employees of all large-scale industrial units, or less than fifteen per cent of all industrial workers.<sup>29</sup> Secondly, even in this limited scope, the financial protection afforded the individual worker is likely to be inadequate. Many industries have been unable, or unwilling, to grant pension benefits of substantial amount.<sup>30</sup> Comparatively few industries have been able, or willing, to undertake the burden of guaranteeing the solvency of their pension systems by devoting current income or surplus to a trust fund or to reinsurance to meet currently accruing liability for future payments.<sup>31</sup> The result in a period of

No. 489; *Care of Aged Persons in the United States* (1929) 288-292; Corey, *Who will pay the Utility Employee's Pension?* (1930) 6 P. U. FOR. 323, 334; Schmidt, *The Present Impasse of Old Age Pensions* (1930) 5 Soc. Sci. 157, 162, 164-5. M. W. Latimer states that "a paramount consideration" in the introduction of the plans on the railroads was the prevention of costly accidents due to age. LATIMER, *op. cit. supra* note 2, at 18.

One ground upon which corporations' acts of establishing a pension system has been held not ultra vires as a carrying on of an insurance business without charter authority is that the pension plan is designed to increase loyalty and efficiency, and improve employee morale. *Heinz v. National Bank of Commerce in St. Louis*, 237 Fed. 942, 952-953 (C. C. A. 8th, 1916); *Beck v. Pennsylvania Rr. Co.*, 63 N. J. Law 232, 241-2, 43 Atl. 908, 910-11 (1889).

28. This is on the assumption that large-scale industrial units are to be defined as those with an annual production value of \$1,000,000 or more. *STATISTICAL ABSTRACT OF THE UNITED STATES—1933* (U. S. Bur. of Foreign and Domestic Comm.) 692; cf. 1 HAYES, *OUR ECONOMIC SYSTEM* (1928) 44-46.

29. 1 LATIMER, *op. cit. supra* note 2, at 55; 2 *id.* at 893. This is based on an estimate that 27,889,000 were gainfully employed as such workers, and that 3,750,000 employees were protected by private industrial pension plans.

30. In 1930, the average per capita annual allowance to pensioners was found by Latimer to be from \$700 to \$710. That includes pensions to high-salaried corporation officials whose pensions might naturally be expected to raise the average considerably. For many industries the average seems to have been much lower. LATIMER, *op. cit. supra* note 2, at 222-224. Average pension allowance in dollar values seems to have risen only 38% from 1914 to 1927, having been \$430 in the former, and \$595 in the latter year. *Id.* at 222. Meanwhile, according to the Federal Reserve Bank of New York index, general prices rose by nearly 75%. GRAHAM, *PUBLIC UTILITY VALUATION* (1934) 22. It would seem that real values of average pensions did not keep pace.

31. 2 LATIMER, *op. cit. supra* note 2, at 588-594. One important burden involved in setting aside such funds in trust would be that the company would have to substitute for such trustee capital with capital borrowed from outside at a higher rate of interest. 2 LATIMER, *op. cit. supra* note 2, at 650. But cf. Bradley, *Joint Pension Fund for Railways* (1930) 89 RY. AGE 697.

Failure to fund, however, while resulting in lower cost to the industry at the outset of the pension plan costs far more in the end. To meet accruing and accrued pension liability for employee service as it arises, by means of a sinking fund, is to reduce ultimate cost by the difference between the immediate capital outlay necessary when compound interest is allowed to do its work, and the future cost of meeting matured claims. See reprints, from various issues of the *Annalist* of 1925, in *Hearings Before a Subcommittee of the Committee*



financial stringency is the insolvency of many plans, deliberalization of others and an increasing improbability that many will continue long to function.<sup>32</sup> This financial instability in periods of business depression is further emphasized by the fact that competitive forces in such a period result in the levy of a prohibitive penalty against many pensioning employers. That is, the recession of prices decreases volume of operations and correspondingly increases pension costs per unit of operations, while existence of a heavy labor surplus tends to nullify the value of the personnel control achieved by a pension system.<sup>33</sup> Thirdly, the private pension system benefits have been accompanied by serious defects. Under nearly all industrial plans, the prospective pensioner forfeits his pension credit upon either separating from his company or being discharged by it at any time prior to the age of retirement. In addition, most companies severely restrict the possibilities of re-employment of such workers in the same company, thus making it impossible for the worker to regain his pension credit. Other companies by whom he may be re-employed will not recognize pension credit earned elsewhere.<sup>34</sup> These provisions as to separation from service are typical

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on *Interstate Commerce on S. 3892 and S. 4646*, *supra* note 27, at 377-389; LATIMER, *op. cit. supra* note 2, at 272-3.

Mr. Latimer estimated that not more than 8% of employees covered by industrial pension plans in May, 1932, were "in companies with pension plans which offered guarantees adequately financed on sound actuarial bases." 2 LATIMER, *op. cit. supra* note 2, at 890.

A recent opinion of a federal court, implying the belief that ratification of pension plans by stockholders, particularly where guarantees to the employees are offered, is essential, may presage legal restrictions further decreasing the possibility of adequate financial provision in the plans. *Id.* at 877, 889; but cf. In the Matter of the State-Wide Investigation . . . of the Wisconsin Telephone Company, reported in Opinion and Order of Wisconsin Public Service Commission (1932) 14-23, 70-73, discussed in 2 LATIMER, *op. cit. supra* note 2, at 878-9.

32. 2 LATIMER, *op. cit. supra* note 2, at 1090-91; Stark, *Watchman, What of Our Pensions* (1933) 161 NEW OUTLOOK 32; Kimball, *The Pension of the Public Service Employee* (1931) 7 P. U. FORT. 660; Schmidt, *supra* note 27. An investigation of Industrial Relations Counsellors, Inc., shows that out of 418 companies operating pension plans in 1929, covering nearly 4,000,000 employees, 40 had abandoned or suspended plans as to new employees by 1932; 61, affecting 1,074,639 employees, had deliberalized their plans; 12, affecting 170,774 employees, had changed from non-contributory to contributory or composite types, in order to shift part of the costs to the employees. The investigation also showed that, while all but four of the 69 new plans adopted between 1929 and 1932 had added to the employee's contractual security by adopting the contributory or composite form, and all but one had been underwritten by some insurance company, all were much less liberal than plans established in the previous period. These plans give little or no credit for service rendered prior to installation of the plan, and reserve in the employer complete discretion as to the age of retirement. SOCIAL SECURITY IN THE UNITED STATES (American Ass'n for Soc. Sec., 1933) 49-53; 2 LATIMER, *op. cit. supra* note 2, at 841-890.

33. LATIMER, *op. cit. supra* note 4, at 293-4; SOCIAL SECURITY IN THE UNITED STATES (American Ass'n for Soc. Sec., 1933) 49; testimony of Donald Richberg in *Hearings Before a Subcommittee on Interstate Commerce on S. 3892 and S. 4646*, *supra* note 24, at 14; Schmidt, *supra* note 27, at 163; Rubinow, *The Ohio Idea: Unemployment Insurance* (1933) 170 ANNALS 76, 77.

34. *Hearings Before a Subcommittee of the Committee on Interstate Commerce on S. 3231, 73d Cong., 2d Sess. (1934)* 137; *Hearings Before a Subcommittee of the Committee*

of the various provisions in the usual plan by which the lower paid worker, most in need of pensions, is discriminated against in favor of prospective pensioners among subordinate officials and management.<sup>35</sup> Also, employers have felt that only when the employee is aware of the fact that the employer retains absolute power to withhold a pension at will can the maximum benefits of increased labor efficiency and personnel control be attained;<sup>36</sup> and the employers naturally hesitate to become bound to meet an indefinite financial burden in the future. Consequently the usual pension plan stipulates that the employer may modify or refuse the benefits thereof at will.<sup>37</sup> The resulting power of the employer so greatly reduces employee independence that the resulting sit-

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on *Interstate Commerce on S. 3892 and S. 4646*, 73d Cong., 2d Sess. (1933) 403; Latimer, *Old Age Pensions in America* (1929) 17 AM. LAB. LEG. REV. 55, 64-66; Editorial, *United States May Take Over Railroad Pension Plans* (1934) 97 RY. AGE 143, 147. It has been suggested that this be changed. FREDERICK, *THE SWOPE PLAN* (1931) 31-37; cf. PENSIONS—FUNDAMENTALS IN THE DEVELOPMENT OF PENSION AND OTHER RETIREMENT PLANS (Dep't of Manufacture of U. S. C. of C., 1929) 38. Employers generally feel that the threat of forfeiture of pension credits by separation from the service is essential to securing the economic gains of stable employment. CONANT, *op. cit. supra* note 27, at 89-91. Labor leaders generally point out that such provisions are designed to destroy the worker's mobility and therefore his powers of collective bargaining. *Id.* at 39-41; 2 LATIMER, *op. cit. supra* note 2, at 758.

35. The worker in the lower-paid categories is most likely to be separated from service previous to time of retirement. Another factor operating in favor of the better paid class of prospective pensioner is the typical provision that the base for calculation of pensions be average earnings during the last few years of service. Whereas employees in the lower ranks receive relatively few pay increases during their working life, and wages of manual workers often tend to decline after their prime is passed, salaries of subordinate officials and executives frequently increase with greatest rapidity in their final years of service. The chances of death and disability also become greater in the lower-paid categories, thus lessening their probability of receiving old-age pensions. 2 LATIMER, *op. cit. supra* note 2, at 764-773. As to railroads in particular, see 1 *id.* at 34; Stark, *Watchman, What of Our Pensions* (1933) 161 NEW OUTLOOK 32. Although contributory private pension plans generally do not discriminate as markedly, in view of their usual provision for death and withdrawal benefits, it is pointed out that the increasingly common practice under such plans, of returning the employee's contributions without interest upon his separation from service, amounts to "racketeering." Stark, *supra*, 33-4; cf. 1 LATIMER, *op. cit. supra* note 2, at 154-5; 2 *id.* at 876.

36. Corey, *supra* note 27.

37. Stark, *supra* note 35, at 32, 35. The following is a typical provision: "Neither the establishment of this Pension Plan nor any of its provisions, nor the granting of a pension . . . shall be . . . construed as creating a contract . . . or any right to a pension; and the company expressly reserves . . . its right to discharge any employee without liability . . . whenever the interest of the company may in its judgment so require." INDUSTRIAL PENSIONS—REPORT OF SPECIAL COMMITTEE ON INDUSTRIAL PENSIONS AND REPORT OF A SURVEY OF INDUSTRIAL PENSION SYSTEMS BY THE INDUSTRIAL BUREAU (N. Y. 1920) 42. See LATIMER, *op. cit. supra* note 2, at 59-60; CONANT, *op. cit. supra* note 27, at 50-51; PENSIONS—FUNDAMENTALS IN THE DEVELOPMENT OF PENSION AND OTHER RETIREMENT PLANS (Dep't of Manufacture, U. S. C. of C., 1929) 30-41. Courts have generally abetted this employer attitude, both where employees have contributed to the pension fund and where they have not, the usual theory being that the pension is a "gratuity"

uation has been characterized by a present member of the United States Supreme Court as the "New Peonage."<sup>38</sup>

Inadequacies inherent in the private pension systems have been most apparent in the railroad industry, partly due to the relatively longer history<sup>39</sup> of private pension systems in that industry. The inadequacies are shown by the fact that the average railroad pension, even when granted, has generally been among the lowest of those of the various pensioning industries, offering to at least twenty-five per cent of the pensioners no more than the equivalent of state relief to aged paupers.<sup>40</sup> There is the further fact that, without exception, the railway pension plans reserve to the employers complete discretion to revoke

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on the part of the employer. *Eisner Co. v. Wilson and Co.*, Equity 30-1119 (S. D. N. Y. March, 1929) unreported; *Cowles v. Morris and Co.*, 330 Ill. 1, 161 N. E. 150 (1928); *McNevin v. Solvay Process Co.*, 32 App. Div. 610, 53 N. Y. Supp. 98 (4th Dep't 1898), aff'd without opinion in 167 N. Y. 530, 60 N. E. 1115 (1898); *Dolge v. Dolge*, 70 App. Div. 517, 75 N. Y. Supp. 386 (4th Dep't, 1902); *Strecker v. Consolidated Gas Co.*, 227 App. Div. 820 (1929); *Pritchett-Thomas Co. v. Pennebaker*, 10 Tenn. App. 425 (1929). Cf. *Coe v. Washington Mills Co.*, 149 Mass. 543, 21 N. E. 966 (1889); *Clark v. New England Telephone and Telegraph Co.*, 229 Mass. 1, 118 N. E. 349 (1918); *Walters v. Pittsburgh and Angeline Iron Co.*, 201 Mich. 374, 167 N. W. 834 (1918). *Contra: McLemore v. Western Union Telegraph Co.*, 88 Ore. 237, 171 Pac. 1049 (1918); *Heinz v. National Bank of Commerce in St. Louis*, 237 F. 942 (C. C. A. 8th, 1916) *semble*. In general, see United States Bureau of Labor Statistics, BULL. No. 489 (1929) 292.

38. *BRANDEIS, BUSINESS A PROFESSION* (1914) 75.

39. The first private industrial pension system adopted in the United States was that of the American Express Company, set up in 1875, followed by that of the Baltimore and Ohio Railroad Company in 1880. By 1905, railroad pension plans covered 35.5% of all railroad employees. The percentage jumped to 66.9% in 1908. *LATIMER*, *op. cit. supra* note 2, at 20-28. There have been no new plans adopted since 1927. There are, at present, 84 railroad pension plans, covering in some form 94% of all carrier employees. Of these, 51 are formal plans, 23 informal, and 10 wholly discretionary. 82.4% of all carrier employees are covered by the formal plans. *Hearings Before a Subcommittee of the Committee on Interstate Commerce on S. 3231*, 73d Cong., 2d Sess. (1931) 91; editorial, *supra* note 34; Brief for Defendants, *The Alton Rr. v. The Retirement Board*, Equity No. 57557, in the Supreme Court of the District of Columbia (1934) 6.

40. Of the 50,126 pensions in force December 31, 1933, 25% called for payments of less than \$30 per month, the average being approximately \$54 per month. Only 2.6% of the benefits exceeded \$100 per month. Brief for Defendants, *supra* note 39, at 8. While the average annual per capita pension for plans of all industries according to recent reports was \$605, that for railroads was \$584. In both cases, these figures, of course, fail to reveal the whole story, in that they include unusual pensions of executives and subordinate officials. *LATIMER*, *op. cit. supra* note 2, at 223, 122-3. Yet, average earnings of railway employees indicate that they are barely sufficient to provide a minimum of subsistence, so that ability to provide for old age would be unlikely. A 1932 representative study of wages of 1000 railway employees showed that only 78 earned between \$2000 and \$3000; 10% earned less than \$500; 38% earned less than \$1000; 66 2-3% earned less than \$1500; 18% earned \$1750, or more. Report of Dep't Committee to the Secretary of Labor, *Earnings and Standards of Living of 1,000 Railway Employees During the Depression* (Gov't Printing Office, 1934).

It is estimated that of all employees entering carrier service, only 17% could hope to qualify for even these comparatively low annuities. Affidavit of M. W. Latimer, Brief for Defendants, *supra*, at 7.

or modify.<sup>41</sup> This characteristic seemed to the employees to be obviously designed to diminish their independence and hence their powers of collective bargaining.<sup>42</sup> Consequently<sup>43</sup> there was a determined but unsuccessful attempt on the part of the railway union workers to preserve their independence by establishing their own trade union pension systems.<sup>44</sup> The next effort on the part of the employees was to secure Congressional action to remedy their condition.<sup>45</sup> The question thus presented before Congress became more important

41. Ekern, *Railroad Pensions* (1934) 24 AM. LAB. LEG. REV. 124; Kimball, *supra* note 32, at 665.

42. 2 LATIMER, *op. cit. supra* note 2, at 754-761. In practically no case, either on the railroads or in other industries, have pension plans been instituted at the request of labor. The attitude of organized labor has been negative, if not openly hostile. *Id.* at 758. At the time of the railway shopmen's strike in 1922, an editorial reported that: "Next to the seniority issue, railway executives state, that the matter of pensions has been the most positive force in working for loyalty . . . , for all strikers lost their pension rights." N. Y. Times, August 6, 1922, as cited by EPSTEIN, *op. cit. supra* note 2, at 164; but cf. LATIMER, *op. cit. supra* note 2, at 757, 759-60, 785. A fairly common provision in pension plans is the following: "A pension may be withheld or terminated in case of misconduct on the part of the beneficiary or for other cause sufficient in the judgment of the Board to warrant such action." CONANT, *op. cit. supra* note 27, at 42, 41-45. Some railroad and other industrial plans contain provisions empowering the employer to recall the pensioned employee to service as a "scab" in event of strike. *Hearing Before a Subcommittee of the Committee on Pensions, on S. 3257*, 71st Cong., 3d Sess. (1931) 5, 7-11; United States Bureau of Labor Statistics, Bull. No. 489 (1929) 291.

43. A further complaint of labor is to the effect that pension plans tend to reduce wages, since employers take the pension cost into account in bargaining with the employee. It is therefore contended that the employee is losing his independence, without any real compensation. United States Bureau of Labor Statistics, *supra* note 42, at 290. The "deferred wage" theory as to pensions is widely accepted, both by labor protagonists and others, including official bodies. *Hearings Before a Subcommittee of the Committee on Interstate Commerce on S. 3892 and S. 4646*, *supra* note 27, at 17-19, 390; SEN. DOC. NO. 140, 70th Cong., 1st Sess. (1928) 100; Report of Illinois Pension Laws Commission (1916) 282; Report of Connecticut Pension Systems Investigation Commission, Conn. Pub. Doc. No. 82 (1931) 8-9; SEN. DOC. NO. 290, 61st Cong., 2d Sess. (1910) 109; EPSTEIN, *op. cit. supra* note 2, at 213. Latimer states that at least part of the pension burden must ultimately rest on the employee in the later stages of an unfunded plan, due to the excessive drain on the employer as peak burdens are neared, and the consequent necessity to reduce wages. 2 LATIMER, *op. cit. supra* note 2, at 784, 788-9. See also CONANT, *op. cit. supra* note 27, at 67.

44. LATIMER, TRADE UNION PENSION SYSTEMS (Ind. Rel. Couns., 1932) 103-5; Latimer, *Old Age Pensions in America* (1929) 17 AM. LAB. LEG. REV. 55, 64-66; Brief for the Defendants, *supra* note 40, at 6; see also Brotherhood of Locomotive Firemen and Engineers v. Pinkston, 55 Sup. Ct. 1 (1934). At the peak of the development of these union efforts to relieve old age dependency, 475,000 railway employees were covered in various ways

45. The movement officially began early in 1930, with the drawing up of a proposed Congressional bill by representatives of eleven railroad labor unions. In all, perhaps eight bills, the first in 1931, were introduced in both Houses of Congress on the subject, previous to enactment. A persistent force behind the proposed legislation was the Railroad Employees' National Pension Association, organized in 1930, and the Railroad Employees' Pension Plan Booster Club, the latter resulting in the monthly publication of the RAILROAD PENSION REVIEW. See LATIMER, *op. cit. supra* note 2, at 34-5; 2 *id.* at 882-6, 1164-67.

as a result of the depression. Reduced railroad operating returns resulted in measures of pension deliberalization or even suspension.<sup>46</sup> In addition, the reduced volume of retirement on pensions, coupled with dismissal of younger men in accordance with the railway seniority-rights system, raised the average age of the railway employees and reduced advancement opportunities.<sup>47</sup> At the same time, dismissal of younger men, rather than retirement of older men on pensions, has to some extent aggravated the unemployment problem by increasing the number of dependent unemployed.<sup>48</sup> These developments threatened both employee old age security and railroad industrial peace.<sup>49</sup>

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46. Mostly since the 10% wage-cut agreement of 1932, 24 railroad pension systems reduced pensions to existing pensioners by amounts varying from 10% to 40%. There was nothing to indicate that such cuts would not be permanent. Many of the companies reduced the percentage factors to be applied in the future against base pay in the calculation of benefits, thus seemingly making permanent revisions. 2 LATIMER, *op. cit. supra* note 2, at 863. The depression hit railroad pension systems with particular severity, as a result of the fact that practically all of them have made no funding provisions. *Hearings Before a Subcommittee of the Committee on Interstate Commerce on S. 3231*, 73d Cong., 2d Sess. (1934) folded chart at p. 91. In other pensioning industries, on the other hand, pension funds to the extent of \$625,000,000 had been accumulated from 1920 to 1932. 2 LATIMER, *op. cit. supra* note 2, at 893. While far from sufficient protection for most industrial units, these funds offered a strong contrast to the precarious railroad situation.

Many roads made no retirements short of compulsory age during recent years; some suspended even that provision; and one road has made no retirements for three years. Editorial, *supra* note 34, at 147.

47. As of April 1, 1930, 3.43% of steam railroad employees were 65 or over, compared with 2.26% in coal mining, 1.50% in oil wells, 2.33% in the chemical industry, 2.61% in iron and steel, and 2.27% in transportation other than railroads. Furthermore, the average railroad employee in 1930 was seven years older than the average employee in all industries other than railroads and eight and one-half years older than the average employee in the communications industry and in transportation other than by railroad. Instead of reducing retirement ages, and also increasing amount of retirement, the railroads retired only 5,694 employees with pensions in 1933 as against 7,330 in 1932, and 7,417 in 1931. The rate of retirement in 1934 has been even lower. Brief for defendants, *supra* note 39, at 11.

Federal Coordinator of Transportation Eastman points out that a survey by his staff "shows that of the total employees in service on January 1, 1934, approximately 25 per cent, or about 250,000 have already attained or will in the next four years attain the age of 65 or more or complete thirty years of service." *Hearings Before the Committee on Interstate and Foreign Commerce on H. R. 9596*, 73d Cong., 2d Sess. (1934) 35. It is estimated that 100,000 superannuated employees will be retired in the first year of operation of the Act. 78 Cong. Rec., June 12, 1934, at 11499.

48. The seniority rules on the railroads are governed by the wage contracts, and are inflexible. As the number of employees is decreased, the younger men are automatically discharged, raising the average age of all employees at the same time. Brief for defendants, *supra* note 39, at 25.

49. The bitter feeling aroused among railroad employees by the pension situation is indicated by the fact that the subject was a point of controversy in the wage disputes of January, 1932, finally settled by the wage agreement of January 31, 1932. Item 3(D) of that agreement provided that the subject be studied by a joint committee of employer and employee representatives, with a view to asking for federal legislation, and that prompt findings be made; neither party, however, committing itself "to accept or to await the

It was to meet these problems that Congress passed the Railroad Retirement Pension Act.<sup>50</sup> In so doing, Congress follows closely the line of old-age pension development in many other countries that either began with a compulsory pension system applied to the railroad industry, or have since made special provision for that industry.<sup>51</sup> However, unlike those countries in which a similar development has taken place, action by Congress raises the question as to whether the necessary power to adopt such legislation has been delegated to the federal government by the Constitution. Specifically, that question is whether the present regulation is a regulation of interstate commerce within the meaning of the commerce clause. And even though it is such a regulation of commerce, there remains the question of whether it is "unreasonable" under the Fifth Amendment.

It is clearly established that Congressional regulation to promote the safety of transport workers or of the public, is a regulation of commerce within the meaning of the commerce clause.<sup>52</sup> While there is no adequate evidence of a causal relation between increased employee age and increased tendency to accidents that would endanger public safety,<sup>53</sup> it can be inferred from the evidence

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results . . ." N. Y. Times, Jan. 31, 1932, at 1, col. 5; (Text of Wage Agreement of Jan. 31, 1932) 134 COMM. AND FIN. CHRON. 916 (1932). Without even attempting the above mentioned negotiation, the unions succeeded in having a pension bill introduced into both houses of Congress in March, 1932. 2 LATIMER, *op. cit. supra* note 2, at 884.

50. Following a defeat on a motion for a temporary restraining order, on August 14, 1934, 134 Class I railroads, the Pullman Company, Railway Express Agency, and the South Eastern Express Company succeeded in having the enforcement of the Act restrained by a permanent injunction in the Supreme Court of the District of Columbia. *The Alton Railroad Company v. Railroad Retirement Board*, Equity No. 57557 (1934), N. Y. Times, October 25, 1934, at 41, col. 2.

51. A comprehensive compulsory system of retirements and pensions for railroad employees was established in France in 1909 to supersede an even earlier compulsory system for such employees, originally established in 1869. Canada first provided a pension system for railroad employees in 1907, Uruguay in 1919, Argentina and Cuba in 1921, and Brazil in 1923. United States Bureau of Labor Statistics Doc. No. 561, *supra* note 17, at 155, 162, 193; Studies and Reports of the International Labour Office, *supra* note 2, at 6-10. Argentina, Brazil and Uruguay initiated their program of compulsory old-age pension insurance by applying it first to railroads only. *Ibid.*; cf. 78 Cong. Rec., June 14, 1934, at 11806-7. Most countries have introduced such insurance for railway workers. *Id.* at 30.

52. Hours of Service law cases: *Baltimore and Ohio Rr. Co. v. Interstate Commerce Commission*, 221 U. S. 612 (1911); *United States v. Kansas City Rr. Co.*, 189 Fed. 471 (D. C. W. D. Ark., 1911). Employers' liability: *Employers' Liability Cases*, 207 U. S. 463 (1907); *Second Employers' Liability Cases*, 223 U. S. 1 (1911). Safety Appliance law cases: *Southern Ry. v. United States*, 222 U. S. 20 (1911); *Chicago Junction Rr. Co. v. King*, 222 U. S. 222 (1911); *Texas and Pacific Ry. v. Rigsby*, 241 U. S. 33 (1915).

53. But cf. PENSIONS FOR INDUSTRIAL AND BUSINESS EMPLOYEES—RAILROAD PENSIONS IN THE UNITED STATES AND CANADA (Ind. Rel. Couns. Prelim. Report, 1929) 13. It is there pointed out that "The force of public safety considerations is apparent." Latimer states that "the paramount consideration" behind the marked growth in railroad pension plans in the United States was that of "public safety" and avoidance by the companies of expensive damage suits likely to result from keeping in the service elderly persons "no longer able to perform their tasks efficiently." LATIMER, *op. cit. supra* note 2, at 18.

that there is a disproportionate tendency to mortality and morbidity among the higher age groups, once an accident has occurred.<sup>54</sup> Thus the effect of age upon an employee, if not increasing the chance of injury, may increase the seriousness of any injury that does occur. It may also be inferred that as to transport workers the strain of service at the higher age periods is so greatly enhanced as to result in serious physical impairment.<sup>55</sup> Consequently, since retirement from service of aged workers does reduce the seriousness of the effects of railway injuries, and prevent physical impairment of the employee by reason of employment at an advanced age, the act may be said to increase their safety and hence to be a regulation of commerce.<sup>56</sup>

Moreover, the Railroad Retirement Pension Act is in a very large sense a regulation of the relation of master and servant in the carrier industry. It is intended to avoid the impending and actual breakdown of the private railroad pension systems. The Federal Coordinator of Transportation has stated that

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It may be shown that the strain of service exists with particular severity among workers in actual transport (International Labour Office Brochure No. 353, *OCCUPATION AND HEALTH* (1934) 1-5); that there is a heavy relative increase in the incidence of heart disease and similar maladies among older industrial workers (information based on a communication of October 3, 1934 to the YALE LAW JOURNAL from the Actuarial Department of the New York Life Insurance Company, and a communication of October 10, 1934, from the National Safety Council); that, therefore, the heavy strain of transport service plus the tendency to disease mentioned makes likely impaired physical condition of the older employee dangerous to safety. Cf. *THE OLDER WORKER IN INDUSTRY* (Nat'l Ass'n of Mfrs., N. Y., 1929). On the other hand, actual statistics of industrial accidents tend to show a decreased frequency among the upper age groups, adduced to be due to their relatively greater experience. 2 LATIMER, *op. cit. supra* note 2, at 774; *Hearing Before a Subcommittee of the Committee on Pensions on S. 3257*, 71st Cong., 3d Sess. (1931) 105; *Hearings Before the Subcommittee of the Committee on Interstate Commerce on S. 3892 and S. 4646*, 73d Cong., 2d Sess. (1933) 399-402; *Is Age a Factor in Industrial Accidents?* (August, 1930) AMERICAN MUTUAL MAGAZINE; Slocombe, *The Dangerous Age in Industry* (1930) 22 NAT'L SAFETY NEWS 68-9. These statistics, however, are not corrected to allow for the fact that many of the older workers may be shifted to less dangerous tasks, thus rendering their tendency to accident statistically slighter. During the past seven years of experience, the death rate from accidents of all kinds in the United States, where the proportion of male and female is the same as among ordinary insured lives (average being about 10% women and 90% men) was .79 per 1000, at age 17; at age 27, 1.07%; at age 37, 1.18; 47, 1.44; 57, 1.76; 67, 2.31. Communication from Actuarial Department of New York Life Insurance Company, *supra*.

54. Denby, *supra* note 9, at 93, 96-7; communication received from National Safety Council, *supra* note 53. The study reported in the American Mutual Magazine, which summarizes practically all the available material, points out that not only does the older man suffer more severely and take longer to recover from injuries, but the cost of compensating him for injury is usually much above that of the younger employee. Thus, while the study tends to show a relatively lower accident frequency in the group of 65 and over, it concludes by recommending installation of a pension system for men over 65 as a financial gain to the employer. *Is Age a Factor in Industrial Accidents?*, *supra* note 53.

55. Note 53, *supra*. See also GOLDBERG, *OCCUPATIONAL DISEASES* (1931) 247.

56. "The power to regulate interstate commerce is plenary and . . . may be exerted to secure the safety . . . of those who are employed in such transportation." *Southern Ry. Co. v. United States*, 222 U. S. 20, 26 (1911).

that breakdown would "work havoc with employment relations."<sup>57</sup> Whether the pension promise of the private pension system be regarded as a promise of a "deferred wage," for which the employee has paid in terms of lower past wage, or solely as a promise of a "gratuity," the fact remains that close to a million employees have to some extent leaned their hopes for old-age security on that promise. To the extent that the Retirement Act places those hopes upon firmer and broader foundations, it is a measure of foresight well calculated to prevent disruption of service by improving employment relations. It is well established that legislation calculated to promote industrial peace in the interstate transport industry is a regulation of commerce.<sup>58</sup>

A further possible form of regulation under the "commerce" clause, is that designed to promote "efficiency in interstate transportation."<sup>59</sup> If "efficiency" be strictly defined in terms of cost accounting, it connotes reduction of unit costs. The Interstate Commerce Commission has shown that the additional cost to the carriers of railroad maximum-hour-day legislation, for example, was more than offset by subsequent increases in quantity-of-service-per-man-hour and income-returns-per-man-hour-of-service.<sup>60</sup> It may be argued that setting a maximum to the number of years of service would tend to have a like effect.<sup>61</sup> As a closer analogy, it may also be shown that a primary purpose of the federal civil service employees' pension system was to decrease unit labor costs by elimination of superannuated employees holding their position by seniority rights.<sup>62</sup> Both analogies, however, are inconclusive on the point

57. Editorial, *supra* note 34, at 147.

58. *Wilson v. New*, 243 U. S. 332 (1917); *Pennsylvania Ry. v. Railroad Labor Board*, 261 U. S. 72 (1923); *Texas and New Orleans Ry. v. Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548 (1930).

59. *Second Employers' Liability Cases*; *Baltimore and Ohio Rr. Co. v. Interstate Commerce Commission*; *Southern Ry. Co. v. United States*; *Texas and Pacific Ry. Co. v. Riggsby*, all *supra* note 52; cf. *Dayton-Goose Creek Ry. Co. v. United States*, 263 U. S. 456, 473 (1923).

60. *Hearings Before the Committee on Interstate and Foreign Commerce on H. R. 7430*, 73d Cong., 2d Sess. (1933) 23, 28, 29; H. R. Doc. No. 496, 72d Cong., 2d Sess. (1932) 8-12.

61. It is noteworthy, however, "that the economies in operation which tended to offset the additional cost of the establishment of the basic 8-hour day (i.e., *Adams Act* of 1917) were largely economies resulting in a reduction in the number of employees . . ." H. R. Doc. No. 496, *supra* note 60, at 12. Similarly, one of the long-run items of efficiency which the employers would hope to obtain by means of the retirement pension system would be the replacement of the superannuated, who hold by seniority rights, with a possibly lower-paid and smaller number of men. Testimony of Transportation Coordinator Eastman, *Hearings Before a Subcommittee of the Committee on Interstate Commerce on S. 3231*, 73d Cong., 2d Sess. (1934) 161-2; LATIMER, *op. cit. supra* note 2, at 774-778; *EMPLOYEES RETIREMENT ANNUITIES* (Report of a Special Committee of the U. S. C. of C., 1929) 29; *PENSIONS—FUNDAMENTALS IN THE DEVELOPMENT OF PENSION AND OTHER RETIREMENT PLANS*, *op. cit. supra* note 3, at 28; Schmidt, *The Present Impasse of Old Age Pensions* (1930) 5 Soc. SCIENCE 157, 160; N. Y. Times, June 26, 1934, at 29, col. 1. This, of course, does not detract from the fact that the installation of the compulsory retirement system would decrease the amount of unemployment.

62. It was estimated in 1911 that the Government stood to lose an average of \$400,000 per year as to employees in Washington, and \$1,200,000 as to all classified civil service



as to whether a compulsory railroad pension system with such relatively generous provision for benefits as the Retirement Act<sup>63</sup> will so far reduce unit operating costs as to more than offset the resultant addition in pension overhead per unit of labor, thus "improving the efficiency of interstate transportation"<sup>64</sup> in terms of cost accounting. But the increase in "efficiency" which may justify legislation as to interstate commerce need not be defined in terms of cost accounting. It may be defined, rather, in terms of increased adequacy of the interstate transport system with respect to the public served by it. As a most obvious example Congress could set joint rates for a group of carriers under the Transportation Act of 1920, and divide the proceeds, not according to shares of service rendered, but according to the needs of carriers, in the interests of increased "efficiency" in terms of adequacy of carrier service as a whole with respect to the public. It was unnecessary to prove that cost to the individual carriers discriminated against would be more than offset by any economic gains.<sup>65</sup> Similarly, it may be argued that installation of a compulsory retirement pension system is a regulation of commerce, in that the elimination of inefficiency due to age is conducive to increased adequacy, and therefore "efficiency," of carrier service.<sup>66</sup>

Granted that compulsory railroad pension legislation is a regulation of interstate commerce, there is a further possible objection to its validity under the Commerce Clause. The Act applies to "any express company, sleeping-car

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employees by continued failure to eliminate the superannuated through a retirement pension system. H. R. Doc. No. 732, 62d Cong., 2d Sess. (1912) 44-5; SEN. DOC. No. 745, 61st Cong., 3d Sess. (1911) 13-14; THE CIVIL SERVICE—MUNICIPAL AND PRIVATE SYSTEMS IN THE UNITED STATES (Committee of One Hundred, Washington, 1912) 18-22. In lieu of such a system, it has been widely contended that governments actually maintain "secret" pensions in the form of sinecures or by paying wages to employees "retired on the job." SEN. DOC. No. 290, 61st Cong., 2d Sess. (1910) 16-17; REPORT OF THE CALIFORNIA COMMISSION ON PENSIONS OF STATE EMPLOYEES (Sacramento, 1929) 8-9; REPORT OF COMMISSION APPOINTED TO STUDY PENSION SYSTEMS IN THE STATE OF CONN. 1930-1931, CONN. PUB. DOC. 82 (1931) 11. As to English history on the subject, see THE CIVIL SERVICE, *supra*, at 19.

63. The Act scales the percentage-of-pay factor, used in determining the pension annuities to which the retired employee is entitled, as follows: 2% of the first \$50, 1½% of the next \$100, 1% of compensation in excess of \$150 and up to the \$300 maximum. § 3. On the other hand, all but one of the 73 existing formal and informal (not including purely "discretionary" plans) railroad pension plans, which fix a definite percentage, set a flat 1% rate; and the one exception sets it at .776%. *Hearings Before a Subcommittee of the Committee on Interstate Commerce on S. 3231, supra* note 61, at 91, see folded chart. Thus, a recent study shows that, except for the Baltimore and Ohio, and the Pennsylvania Railroad, substitution of the Retirement Act for existing voluntary pension systems will raise annual pension costs for at least 22 Class I carriers from as low as \$132,062 in the case of N. Y., N. H. & H. Rr. Co., to as much as \$2,424,511 in the case of the N. Y. Central. Gates, *New Pension System Cuts Into Rail Earnings* (1934) 54 MAG. OF WALL STREET 342. For comparisons of average per capita pensions under the private plans and under the act, see Editorial, *supra* note 34, at 148-149.

64. *Supra* note 1, § 2.

65. *New England Divisions Case*, 261 U. S. 184 (1923). The point was not raised.

66. See excerpts from affidavit of Coordinator of Transportation Eastman, Brief for Defendants, *supra* note 39, at 31-32.

company, carrier by railroad, subject to the Interstate Commerce Act." It applies to any company that is directly or indirectly subsidiary to, or under common control with, any of the above companies, and that is also engaged in various-named essential functions connected with the transportation of persons and property by railroad.<sup>67</sup> Within certain limits as to age<sup>68</sup> and dates of service,<sup>69</sup> the Act includes all employees of the above companies, without respect to the character of service rendered. Its terms would thus include the railroad legal staff, or accountants, or traffic solicitors, as well as the persons operating interstate trains. Consequently the railroads contend that, within the meaning of the *Federal Employers' Liability Cases*,<sup>70</sup> at least one-fifth of the total number of employees covered by the Retirement Act do not "work in interstate commerce or in work so closely connected therewith as to be a part thereof" and that the Act is accordingly unconstitutional.<sup>71</sup>

However, the distinctions drawn in the *Employers' Liability Cases* have not for all purposes drawn the line to which Congressional regulation of interstate commerce may extend. The Employers' Liability law provided solely for an improved remedy of the plaintiff railroad employee in negligence causes.<sup>72</sup> It modified the relationship of employer and employee at a particular point in space and time. Its administration involved simply a judicial determination

67. § 1 (a). The definition is identical with that used in the 1934 amendment to the Railway Labor Act of 1926, 48 STAT. c. 691 (1934), 45 U. S. C. A. §§ 151-162 (Cum. Pamph. 1934).

68. Pensions are available to employees who have reached 65, or served a total of 30 years in "carrier" employment. § 3. To adapt the Act to possible individual deviations of physical and mental capability from the fixed norm, provision is made for a maximum extension of retirement age to 70, by mutual agreement between employer and employee. § 4. The Act penalizes employees with 30 years of service, who retire before 65, by deducting 1/15 of the pension annuity for each year the employee is less than 65 at retirement. § 3. An exception is made in the event that retirement is caused by mental or physical incapacity.

69. The Act applies to all employees of "carriers" covered by the Act, who have been, or will be, for any length of time in "carrier" service after June 27, 1933. § 1 (b).

70. See note 52, *supra*.

71. Bill of Complaint (for temporary restraining order) *Alton Rr. Co. v. Railroad Retirement Board*, Equity No. 57557, Supreme Court of the District of Columbia (1934) 12-13. This would include at least 200,000 employees, to whom some \$300,000,000 annual wages are paid.

72. It eliminated the assumption of risk and fellow servant employer defenses of the employer. GAVIT, *THE COMMERCIAL CLAUSE* (1932) 145-147. The amended Employers' Liability Law applies to the employees of every common carrier by railroad engaged in interstate commerce, while the employee is engaged in such commerce. The court has given a general content to the first requirement in deciding cases. On the other hand "employed in such commerce" has been assumed to be something other than "engaged in interstate commerce" in general, and has been filled with much more specific content. *Id.* at 145-155, 219-220. Gavit is of the opinion that the "theory of the case" has been repudiated in the subsequent cases on the Second Employers' Act [compare the opinion of Van Devanter, J., who rendered the opinion in the Second Employers' Liability Cases, in *Illinois Central Rr. v. Behrens*, 233 U. S. 473, 477 (1913)], the Safety Appliance Act, Intrastate Rate cases, and such cases as the *Coronado Coal Co.* cases. *Id.* at 219-220.

of a non-recurring relationship, created by an accident at that particular point of space and time.<sup>73</sup> Consequently, under the limitation imposed by the Court, the liability regulation was still possible of effective administration as a regulation of interstate commerce.<sup>74</sup> The Railroad Retirement Act, on the other hand, requires a large scale and minute administration, based on the total periods of employment of each employee subject to the Act. It gives credit to employees for service for any period of time, no matter how short, up to a maximum total of thirty years, even though such service was intermittently distributed over a period of many more years.<sup>75</sup> It gives credit for service rendered previous to the date of enactment to any carrier by any employee who serves for any length of time subsequent to June 27, 1933.<sup>76</sup> To attempt to restrict the administration of such regulation to a portion of a business unit on the basis of categories created for a different purpose would create insuperable obstacles.

From the point of view of administrative necessity, the type of analysis possible for the determination of the *Employers' Liability Cases* is impossible of application to the present regulation. If that type of analysis were accepted, then, in order to determine when employee and employer contributions are due to the pension fund, the carriers, their employees and the Retirement Board would continually have to make difficult, if not impossible, determinations as to when the employee is doing interstate rather than "intrastate" work. There could be no adequate check on the railroad reports of such separate employment. Innumerable points of difficulty and contention would arise in attempting to determine, on the same basis, to what extent the service rendered prior to the enactment of the Act may be included in the computation of the amounts of the pension annuities payable, particularly in view of the lack of records on the subject in the past. These elements of uncertainty

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73. Even within these narrow limits, the problem of its administration in accordance with the impractical lines drawn by the first *Employers' Liability Cases* has proved difficult and expensive. Schoene and Watson, *Workmen's Compensation on Interstate Railways* (1934) 47 HARV. L. REV. 389. Cases under the Act have come to the following "incongruous results," among others: "one who cooks food to be fed to a bridge-repair gang is in interstate commerce, or one who carries water to a section hand is so engaged; but one who places coal on a feeding chute to be used to feed an engine used in interstate commerce is not so engaged; one who starts a pump to furnish water to an engine is." GAVIT, op. cit. *supra* note 72, at 153-155. See also ROBERTS, *FEDERAL LIABILITIES OF CARRIERS* (2d ed., 1929) 1073-1110, 1363-1514.

74. This would indicate that, at least as far as the question of administration of the particular Act was concerned, the employees who were excluded did not have any connection with interstate commerce, since their exclusion did not impair its regulation. The holding of the *First Employers' Liability Cases* was subsequently said by Mr. Justice Van Devanter, in *Illinois Central Rr. Co. v. Behrens*, 233 U. S. 473, 477 (1913), to be to the effect that the first Act was invalid because of its regulation of employers as to employees whose "employment had no connection whatsoever with interstate commerce."

75. This is the so-called "pooling of service credits" provision of § 1 (b). It is a legislative solution for the inadequacy shown in the private pension systems. See note 34, *supra*.

76. § 3.

would further impair the administration of the Act by rendering accurate actuarial predictions of future pension expense next to impossible. Thus the exclusion from the operation of the Retirement Act of all persons excluded from the scope of the Liability Act would seriously impair its administration, indicating that, for the purpose of the Retirement Act, many of these persons have a direct connection with interstate commerce.

It is conceivable, however, that there are employees who are subject to regulation by the terms of the Act, but whose regulation is not necessary to make possible the administration of the Act. The group said by the railroads to be engaged in "intrastate" commerce includes "mechanical employees; executives and general officers and their staffs, not including the operating vice presidents and their staffs; those engaged in accounting not having a direct relationship to interstate transportation; those engaged in the construction of buildings or of new equipment; those who devote themselves to finances, custody and administration of funds or to corporate proceedings and records; those engaged exclusively in work relating to real estate taxes and titles, in the management, operation, care and protection of buildings or lands "not devoted to or used in connection with" transportation; men employed in coal mines; clerical assistance in connection with the work mentioned."<sup>77</sup> Yet, most of these employees would seem to have a necessary functional intimacy with the operation of an interstate transport system.<sup>78</sup>

Changes in the scope and complexity of business relationships have forced the Court for an increasing number of purposes to mark the extent of permissible federal regulation along functional lines.<sup>79</sup> Thus, in order to insure the efficiency and adequacy of the interstate transport system as a whole, Congress may fix uniform rates and determine excess earnings for purposes of "recapture" on the basis of the carrier's property investment and needs in both intra and interstate commerce.<sup>80</sup> And where the rates imposed by a state may tend

77. See memorandum opinion of Wheat, C. J., holding the Act unconstitutional. *Alton Rr. Co. v. Railroad Retirement Board*, Equity No. 57557, N. Y. Times, October 25, 1934, at 1, col. 1 (Sup. Ct. D. C. 1934). The court held that many of these some 200,000 employees "do not work in interstate commerce or in work so closely connected therewith as to be a part thereof." See also page 12 of the bill of complaint on petition for a temporary restraining order in the above case.

78. The Interstate Commerce Commission includes these employees in its reports without distinction, and takes them into account for purposes of determining the "fair return" for the carriers, necessary to maintain adequate and efficient interstate transport service. The Emergency Railroad Transportation Act takes all these employees into consideration, both for purposes of coordination of railroad activities, and for purposes of avoiding "wastes and preventable expense." 48 STAT. 211, 49 U. S. C. A. § 254 (1933). Thus, in the report of the Senate Committee on the Emergency Railroad Transportation Act, specific mention was made of "executives", now said by the railroads not to be in interstate commerce. The hope was expressed that the "coordinator . . . cut off unnecessary and fabulously high paid executives." SEN. REP. No. 87, 73d Cong., 1st Sess. (1933) 2.

79. GAVIT, *op. cit. supra* note 72, at 219-220. "Every employee of a railroad engaged in interstate transport is employed in interstate commerce in a factual sense." *Id.* at 153-155.

80. See *Dayton Goose-Creek Ry. Co. v. United States*, 263 U. S. 456, 478-8 (1923).

to lower operating revenues in interstate commerce, or result in the intrastate traffic's failure to bear a fair share of the cost of the total enterprise, the federal government may change such rates.<sup>81</sup> Similarly, it may regulate the issuance of carrier securities with regard to the earning capacity of the interstate carrier as a functional unit, irrespective of the "intrastate" nature of part of the commerce in which it engages.<sup>82</sup> It may govern the abandonment or increase of an interstate carrier's facilities in "intrastate" commerce, so as to prevent increased costs that would impair the adequacy of the unit as a whole.<sup>83</sup> It may regulate the carrier employment relationship as to labor disputes without regard to the character of the work done by the employees thus regulated.<sup>84</sup> The guiding principle in these cases is that, if the subject to be controlled reflects ultimately as a burden or benefit of importance to interstate commerce, the control is valid.<sup>85</sup>

The constitutional question under the Railroad Retirement Pension Act would seem to be determinable by the same considerations. The separation between "inter" and "intrastate" employment, urged by those carriers covered by the Act, would leave an estimated one-fifth of the carrier employees<sup>86</sup> subject to the impending breakdown of the private pension systems. Not only would their resultant bitterness from this source lead to industrial dispute, but the additional element of discrimination thus introduced would actually aggravate the problem. The financial and other costs of such labor troubles must necessarily reflect as a burden on interstate commerce. Secondly, fail-

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81. *New York v. United States*, 257 U. S. 591 (1921); *Wisconsin Railroad Commission v. Chicago, Burlington and Quincy Rr. Co.*, 257 U. S. 563 (1922); *United States v. Village of Hubbard, Ohio*, 266 U. S. 474 (1924); cf. *The Minnesota Rate Cases*, 230 U. S. 352 (1912); *Houston and Texas Ry. v. United States*, 234 U. S. 342 (1913).

82. *Pittsburgh and West Virginia Ry. Co. v. Interstate Commerce Commission*, 293 Fed. 1001 (App. D. C. 1923), *aff'd*, 266 U. S. 640 (1924).

83. *Colorado v. United States*, 271 U. S. 153 (1926); *Texas and Pacific Ry. v. Gulf Ry. Co.*, 270 U. S. 266, 277 (1925); *Texas and New Orleans Ry. Co. v. North Side Belt Ry. Co.*, 276 U. S. 475, 479 (1928); cf. *Railroad Commission v. Southern Pacific Co.*, 264 U. S. 331 (1923); *Alabama and Vicksburg Ry. Co. v. Jackson and Eastern Ry. Co.*, 271 U. S. 244 (1926).

84. Title III of the Transportation Act of 1920, 41 STAT. 470 (1920), 45 U. S. C. A. § 136 (1926), established the Railroad Labor Board, with authority to decide disputes voluntarily submitted to it by either a carrier or its employees. The Act made no distinction as to "intra" or interstate character of employment. The Pennsylvania Railroad sought to enjoin the Board from rendering a decision in a dispute submitted by a union of railway shopmen, one of the categories of employment alleged by the railroads in the present case to be invalidly regulated by Congress. The Court refused to enjoin the Board's decision, and seems to have assumed the validity of the extension of regulation to cover such a category of employment. The point was not raised. *Pennsylvania Railroad Co. v. United States Railway Labor Board*, 261 U. S. 72 (1922); cf. *Texas and New Orleans Rr. v. Brotherhood of Ry. Clerks*, 281 U. S. 548 (1930), applying to clerks.

85. Cf. *Baltimore and Ohio Rr. Co. v. Interstate Commerce Commission*; *Southern Ry. v. United States*; *Texas and Pacific Ry. Co. v. Rigsby*, all *supra* note 52. As to the Railroads' inclusion of accountants in the category of non-regulable "intrastate" employment, see *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194 (1911).

86. An estimated 200,000 employees. See note 77, *supra*.

ure to provide for these employees would entail failure to improve carrier service, to the extent that the work of such superannuated employees necessarily reflects on the adequacy of the transportation system as a whole.

Two additional grounds may be advanced upon which the extensiveness of the regulation may be upheld. In the first place, Congress has obviously attempted to confine the scope of the Act to those employers and employees who, on the whole, control and affect interstate commerce. In passing upon other regulation, though not under the commerce clause, the Supreme Court has held that a general classification made by a legislature with a legitimate end in view will not be overthrown because of the incidental inclusion of objects otherwise not subject to its control. It has refused to invalidate the legislation, but instead has merely excluded such objects from its scope when the occasion arose.<sup>87</sup> Thus the Court could sustain the constitutionality of the Act as a whole, but by a process of definition exclude the few persons as to whom it should not apply and to whose inclusion complaint could subsequently be made. In the second place, the railroads may, if they choose, segregate such persons as are engaged in mining, sale of electricity, or similar activities not sufficiently related to interstate transport, under separate corporations, thus placing them clearly outside the scope of the Act.<sup>88</sup> Any persons whom the carriers find are too intimately connected with interstate business to make this possible would seem for that very reason justifiably included.

Granted the power of Congress to regulate the subject-matter, the final question is whether the Railroad Retirement Act imposes "unreasonable" burdens upon the "carrier" industry, within the meaning of the Fifth Amendment. An important objection to the Act proceeds on the basic assumption that legislation as to interstate commerce can only be justified in terms of increased gains to the instrumentalities of commerce, commensurate with the burdens imposed. On the basis of that premise, opponents of the Act balance the gains to the railroad industry against the very real expenses to be met in a period of carrier financial exigency.<sup>89</sup> Alleging that at least the immediate,

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87. Contrast *Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926) with *Nectow v. Cambridge*, 277 U. S. 183 (1928); cf. *Louisville and Nashville Rr. Co. v. Melton*, 218 U. S. 36 (1910); *Second Employers' Liability Cases*, 223 U. S. 1, 52-53 (1911); *Powell v. Pennsylvania*, 127 U. S. 678, 685 (1888).

88. So-called "non-carrier" operations, such as mining of coal, holding of securities, rental of properties, sale of electricity, seem to account for a relatively insignificant percentage of carrier expense. These are segregated on the carrier accounts under non-operating income and expense. The accounts for 1932, for example, showed that the expense of investment business for all Class I railways in that year was \$31,827. INTERSTATE COMMERCE COMMISSION, STATISTICS OF RAILWAYS (1932) S-56.

89. For some evidence of the economic difficulties involved, see *Hearings Before a Subcommittee of the Committee on Interstate Commerce on S. 3231*, 73d Cong., 2d Sess. (1934) 84-4, 86-9, 93-6, 14-149; Gates, *New Pension System Cuts into Rail Earnings* (1934) 54 MAG. OF WALL STREET 342; Editorial, *The Railroad Dilemma*, N. Y. Times, July 17, 1934, at 18, col. 1. It is to be noted, however, that the figures given by the railroads as illustrative of their decreased revenues due to water and bus competition are exaggerated by failure to record the fact that the railroad themselves, in many instances, own such competitors. It is to be noted, also, that railroad estimates of earnings are to some

if not the long-run, balance leans heavily to the side of expenses, they assail the Act as having for its broader purpose the initiation of a social insurance and re-employment program, in the interests of which, imposition on the carriers is now attempted.<sup>90</sup>

However, if Congress has the power to regulate the master-servant relationship in interstate commerce, and if pension legislation is legislation as to that relationship, the reasonableness of the particular measure may be justified in terms of improvement of the general public welfare by a social insurance and re-employment program. When Congress prohibits traffic in obscene literature,<sup>91</sup> or unhealthy cattle,<sup>92</sup> or lottery tickets,<sup>93</sup> or white slaves,<sup>94</sup> or impure foods and drugs,<sup>95</sup> or liquor prohibited by the state,<sup>96</sup> or prizefight films in interstate commerce,<sup>97</sup> it surely is not increasing the revenues of the railroad industry in any ordinary sense. It is, rather, using means of regulation which "have the quality of police regulations."<sup>98</sup> It is so regulating the instrumentalities of commerce, irrespective of the burden or benefit to them, as to "guard the morals,"<sup>99</sup> or "promote the general welfare, material and moral."<sup>100</sup> The Fifth Amendment, in the field of federal activity, does not prohibit government regulation for the public welfare.<sup>101</sup> Thus, if it be assumed that railroad pension legislation is unduly expensive in terms of concrete gains to railroad stock and bondholders, the benefit in terms of social amelioration may be added to the benefits in terms of improved carrier safety and service, and posed against the expense, within the meaning of the Fifth Amendment.

A further consideration under the question of "due process" is whether various specific means by which Congress has chosen to achieve its purpose are "reasonable." The Act provides for the pooling of all retirement contributions from the various carriers and their employees.<sup>102</sup> It thus treats the railroad industry as one employer, for the purposes of the Act. It thereby takes the property of a carrier without an assurance that the return in annuities to the carrier's employees will be proportionate to the expense. The purpose

extent calculated on the basis of an over-inflated capital and debt structure, for which the carriers must be held largely responsible. GARTNER, *GOVERNMENT PLANNING FOR INTERSTATE TRANSPORTATION* (1934) 28 et seq. It would seem somewhat unjustifiable to use such uncorrected figures as a basis for refusing to meet the problem of labor superannuation in the railroad industry.

90. See pages 10 and 11 of the bill of complaint in *Alton Railroad Co. v. Railway Retirement Board*, *supra* note 71.

91. *United States v. Popper*, 98 Fed. 423 (N. D. Cal. 1899).

92. *Reid v. Colorado*, 187 U. S. 137 (1902).

93. *Lottery Case*, 188 U. S. 321 (1903).

94. *Hoke and Economides v. United States*, 227 U. S. 308 (1913).

95. *Hipolite Egg Co. v. United States*, 220 U. S. 45 (1911).

96. *Clark Distilling Co. v. Western Maryland Rr. Co.*, 242 U. S. 311 (1917).

97. *Weber v. Freed*, 239 U. S. 325 (1916).

98. *Hoke and Economides v. United States*, 227 U. S. 308, 323 (1913).

99. *The Lottery Case*, 188 U. S. 321, 357 (1903).

100. *Hoke and Economides v. United States*, 227 U. S. 308, 322 (1913).

101. *Nebbia v. People of the State of New York*, 291 U. S. 502, 525 (1934).

102. § 5.

of pooling contributions is threefold; first, to iron out possible fluctuations in mortality, morbidity, and wage rates, so as to make future annuity burdens more predictable; second, to distribute the risk of loss from failure of employer contributors; third, to reduce administrative costs.<sup>103</sup> Financially sounder concerns will to some extent be less benefited by such pooling. A company that fails financially, however, is not likely, in view of the penalties of the Act<sup>104</sup> and the disastrous effect on its own employment relations, to have been long remiss in contributions. In actual practise, the number of roads completely ceasing operations in even the most severe period of the depression, has been insignificant.<sup>105</sup> Where that occurs, the discharge of a concern's employees, following its demise, cannot add to the burdens of the plan. The pension annuities for these employees would be based solely upon service rendered prior to time of discharge and for which normal contributions had been made.<sup>106</sup> The discrimination against sounder concerns would thus seem not of vital importance.<sup>107</sup>

Congressional treatment of carrier employers as one unit for purposes which such treatment is best adapted to achieve has been a frequent occurrence. Congress may lay down blanket rates over all carriers, or by rate groups, or by territories, and "recapture" the higher resultant earnings in the interests of the less efficient.<sup>108</sup> Congress may effect the same result by increasing joint

103. Cf. 2 LATIMER, op. cit. *supra* note 4, at 943-4.

104. § 12: "On the failure of any carrier to make any payment when due under the provisions of this Act, such carrier, unless excused by the order of the Board, shall pay an additional 1 per centum of the amount of such payment for each month such payment is delayed." Cf. § 13.

105. In 1932, a severe depression year for the railroads, the number of miles of road involved in cases where operations ceased was 401, out of a total of 247,594 miles operated. INTERSTATE COMMERCE COMMISSION, STATISTICS OF RAILWAYS (1932) s-4, s-5.

106. §§ 3, 5.

107. It is not to be denied that pooling will result in various subtle discriminations. For example, discrimination will occur as against companies with a greater proportionate share of employees in the higher-salary ranges, the higher-salary ranges being disfavored under the Act. § 3. The variance in number of employees immediately eligible to retire as between the various roads under the Act, in average age of employees, and in amount of prior service will operate similarly. See page 18 of the bill of complaint in *Alton Rr. Co. v. Railroad Retirement Board*, *supra* note 71. Mr. Eastman has pointed out that "In general, railway employees in the East are older than they are in the West. Employee contributions which are uniform in relation to payroll, or to some other fixed base, would in general result in the eastern railroads paying less than their share of the cost and the western carriers paying more." *Hearings Before a Subcommittee of the Committee on Interstate Commerce on S. 3231*, 73d Cong., 2d Sess. (1934) 159; but cf. Brief for the Defendants, *Alton Rr. Co. v. Railroad Retirement Board*, *supra* note 39, at 60. It is possible that the administrative cost of attempting to prevent such discriminations under the Act would far exceed the cost which may at present be incurred by roads so discriminated against.

108. *Dayton Goose-Creek Ry. Co. v. United States*, 263 U. S. 456 (1923). The fact that the purpose of promoting the adequacy of the interstate transportation system as a whole was achieved under a rationale of trusteeship does not detract from the essential validity of the power exercised. The Emergency Railroad Transportation Act of 1933.



rates for a group of carriers and dividing the shares of return, not according to the shares of service rendered, but according to the degree of financial embarrassment.<sup>109</sup> It may compel the "sharing of one company's terminals with one or more companies as a permanent arrangement," in the interests of the efficiency of the whole system.<sup>110</sup> It may compel the pooling of all coal-cars of various owners in a particular mine district and the limitation of each mine to a pro rata share, irrespective of the individual contractual rights and duties of the carrier or private shipper.<sup>111</sup> It may even constitute independent carriers fictional agents of each other for the purpose of improving the unit convenience and responsibility of the carrier system to the public.<sup>112</sup> The question is not, whether the individual carrier has been forced to contribute more than its rateable share of property. It is, rather, whether the public interest in the adequacy of the transportation system as a whole justified the discrimination.<sup>113</sup>

A second problem of due process raised by the administrative provisions of the Act is its provision for giving credit for service rendered prior to the date of enactment by employees subject to the Act.<sup>114</sup> Theoretically, the provision makes it possible for perhaps a million former railroad employees, not at present covered by the Act, to secure full pension credit for prior service rendered, perhaps, in the distant past, merely by securing re-employment with any carrier subject to the Act, for any length of time.<sup>115</sup> Actually, the carriers

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*supra* note 78, in repealing the recapture clause of the Transportation Act of 1920, provided for a pro rata return of the existent recapture fund to those carriers from whom sums had been recaptured. If the trusteeship theory was sound, it would seem that the sum subject to recapture, being an excess over fair return to the railroads, never became the property of the carriers. As pointed out by the Court, the carrier simply held the fund as a trustee for the benefit, presumably, of the United States, the real owner, who might distribute the fund in accordance with the needs of the transportation system as a whole. If so, under what theory could the Government give back to the carriers money which never belonged to them?

109. *New England Divisions Case*, 261 U. S. 184 (1923).

110. *Railroad Commission v. Southern Pacific Ry. Co.*, 264 U. S. 331, 343 (1923); cf. *United States v. New York Central Rr. Co.*, 272 U. S. 457 (1926).

111. *The Assigned Car Cases*, 274 U. S. 564 (1926); cf. *Interstate Commerce Commission v. Illinois Central Rr. Co.*, 215 U. S. 452 (1910).

112. *Atlantic Coast Line Rr. Co. v. Riverside Mills*, 219 U. S. 186 (1911).

113. Decisions with respect to the exercise of state police power furnish what is in some respects an even closer analogy. *Noble State Bank v. Haskell*, 219 U. S. 104 (1910); *Able State Bank v. Bryan*, 282 U. S. 765 (1931) (pooling assessments on the deposits of all of a state's banks in the interests of the "ulterior public advantage" afforded by a deposit guarantee system). *Mountain Timber Co. v. Washington*, 243 U. S. 219 (1916) (pooling assessments from employers on the basis of total payroll and degree of industrial hazard, for the purpose of securing compensation to workmen for industrial injury and death). While these cases arose under the 14th Amendment, it is to be noted that the federal power as to the functions demarked for it by the Federal Constitution are as unrestricted as the police power of the states with respect to residual functions. *Nebbia v. People of the State of New York*, 291 U. S. 502, 525 (1934).

114. § 3.

115. There being some 700 carriers subject to the Act (most of them subsidiaries and

seem to have already made impossible the re-employment of such persons, at least, since the date of enactment.<sup>116</sup> The problem assumes greater practical importance, however, in relation to the general validity of pension payment for service rendered prior to the date of enactment by employees now covered by the provisions of the Act. It may be argued that payment for prior service cannot improve the quality of present and future interstate carrier service. Thus viewed, the Act effects an unconstitutional retroactive resurrection of, and addition to, a wage contract discharged by full past payment.<sup>117</sup> State courts have often faced the same pension problem in connection with state constitutional provisions prohibiting "gratuities," "extra compensation" above the contract wage to government employees subsequent to rendition of service, or devotion of public funds to a private purpose. Almost uniformly, prior service provisions in government employee pension plans have been sustained on the ground that they are compensation to the employee for remaining with the service and thus lending to the service in the future the benefit of his past experience.<sup>118</sup> The argument seems tenuous. Nevertheless, the fact that it is practically uniformly accepted indicates that vital considerations, seldom mentioned, are behind the sterile legal approach. One of those vital considerations, mentioned by at least one court, is the prevention of the dissatisfaction and bitterness of the older employees, detrimental to efficiency of the service.<sup>119</sup> Another, not less vital, is the fact that the full benefits of a pension system in terms of security for retired employees could probably not be achieved within a generation of the date of enactment, were the system robbed of its prior service provisions.<sup>120</sup> These arguments seem not less pertinent, when applied

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companies under common control with the larger companies), the carriers contend that such a provision would invite widespread fraudulent attempts to secure temporary carrier service for purposes of receiving pension credit for prior service. *Hearing Before a Subcommittee of the Committee on Interstate Commerce on S. 3231*, 73d Cong., 2d Sess. (1934) 133; see pages 18 and 19 of the bill of complaint in *Alton Rr. Co. v. Railroad Retirement Board*, *supra* note 71.

116. Testimony of Mr. Eastman, Federal Coordinator of Transportation, *Hearing Before a Subcommittee of the Committee on Interstate Commerce on S. 3231*, 73d Cong., 2d Sess. (1934) 162.

117. *Hearing Before a Subcommittee of the Committee on Interstate Commerce on S. 3231*, 73d Cong., 2d Sess. (1934) 124-34; cf. *Beck v. Pennsylvania Rr. Co.*, 63 N. J. Law 232, 43 Atl. 908, 911 (1899).

118. *O'Dea v. Cook*, 176 Cal. 659, 169 Pac. 366 (1917); *Hughes v. Traeger*, 264 Ill. 612, 106 N. E. 431 (1914); *People v. Abbott*, 274 Ill. 380, 113 N. E. 696 (1916) (payment for prior service is payment for service for which insufficient compensation was originally made); *Porter v. Loehr*, 332 Ill. 353, 163 N. E. 689 (1928); *DeWolf v. Bowley*, 355 Ill. 530, 189 N. E. 893 (1934); *Fellows v. Connolly*, 193 Mich. 499, 160 N. W. 581 (1916); *Ham-mitt v. Gaynor*, 144 N. Y. Supp. 123 (Sup. Ct. Special Term 1913); *City of Philadelphia Police Pension Fund v. Walton*, 182 Pa. St. 373, 38 Atl. 790 (1897); *State v. Levitan*, 181 Wis. 306, 193 N. W. 499 (1923); *O'Neil v. Blied*, 188 Wis. 442, 206 N. W. 213 (1925). *Contra*: *State ex rel. Heaven v. Ziegenhein*, 144 Mo. 282, 45 S. W. 1099 (1898); *State v. Kimmel*, 256 Mo. 611, 165 S. W. 1067 (1914).

119. *State v. Levitan*, 181 Wis. 306, 193 N. W. 499 (1923).

120. REPORT OF THE CALIFORNIA COMMISSION ON PENSIONS OF STATE EMPLOYEES (1929) 13-14.

to a private industry. Furthermore, an important purpose of the retirement plan is to improve employee morale and efficiency by removing the fear of old-age insecurity. To render the present and future annuity more adequate by giving pension credit for past depreciation of the human item would seem to be an apparently reasonable method of accomplishing that purpose.<sup>121</sup>

It cannot, of course, be pretended that the line of reasoning herein presented is, alone, conclusive. Yet in the light of the social problem with which the Act deals, and in view of the broad powers of railroad regulation already found necessary to be exercised by Congress, the present regulation seems permissible. However, the fact that it controls employer activity with regard to individuals who have, for other purposes, been hitherto deemed to be solely within the jurisdiction of the states may seem to require a doctrinal extension that would impair previous categories created by the Court. This has already led one judge to declare the Act unconstitutional.<sup>122</sup> If the effect of the Act would be to extend federal control at the expense of the states, the objection would have some importance. But the Act would not do this, since the states could not in fact effectively exercise their jurisdiction in this field because of the very administrative difficulties that make federal control necessary. And even though the present Act be declared unconstitutional, its repassage in a modified form to meet the present objections might force the railroads again into the very position from which they now seek to escape. The administration of a restricted form of the same regulation might well be so expensive as to render improbable in practice any substantial deviation from the requirements of the present Act.

### CORRECTION OF DAMAGE VERDICTS BY REMITTITUR AND ADDITUR

THE efficiency of judicial administration is hampered by the granting of new trials, with their concomitant delays in final adjudication and increased costs to litigants.<sup>1</sup> Courts and legislatures have sought to avoid these evils by eliminating retrials for both excessive and inadequate verdicts.

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121. It is immaterial that the incidental effect (in this case, addition to a past wage) of achievement of the valid purpose may be such that, standing alone, it would invalidate the legislation. See *McCray v. United States*, 195 U. S. 27, 63-4 (1904); *Arizona v. California*, 283 U. S. 423, 456 (1931); cf. *Stephenson v. Binford*, 287 U. S. 251, 276 (1932); *Weber v. Freed*, 239 U. S. 325, 330 (1916).

Just as in the case of a statute regulating hours of labor, the Retirement Act leaves the railroads free to bargain with their employees with respect to amounts of wages to be paid under the changed circumstances. Cf. *Bunting v. Oregon*, 243 U. S. 426, 435 (1917).

122. *Alton Rr. Co. v. Railroad Retirement Board*, *supra* note 50.

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1. "The consequence [of awarding new trials] has been to prolong litigation, to swell bills of cost, to delay final adjudication, and, in a large number of instances, to have such excessive judgments repeated over and over, upon the new trial." *Alabama Great Southern Rr. v. Roberts*, 113 Tenn. 488, 493, 82 S. W. 314, 315 (1904). "It is thus held in reserve as a last resort, because it is more expensive and inconvenient than other remedies . . ." *Lisbon v. Lyman*, 49 N. H. 553, 600 (1870).

When the jury has returned a verdict for unliquidated damages which the trial court deems excessive, but not caused by passion or prejudice, most American jurisdictions allow the court to deny a new trial on condition that the plaintiff agree to a remission of the excess above an amount which the court considers reasonable.<sup>2</sup> Appellate courts, also, may order a remittitur as a condition of affirmance when the lower court has failed to act,<sup>3</sup> or, with the consent of the prevailing party, may require a further remission of a verdict already reduced below.<sup>4</sup> The discretionary authority of trial and appellate courts to grant consent remittiturs is often confirmed by statute.<sup>5</sup>

A few courts, on the ground that the use of remittiturs is unconstitutional, refuse absolutely to allow them,<sup>6</sup> or permit them only when the exact amount of the excess may be computed mathematically.<sup>7</sup> But the constitutionality of the

2. *Arkansas Valley Land and Cattle Co. v. Mann*, 130 U. S. 69 (1888); *Gila Valley Ry. Co. v. Hall*, 13 Ariz. 270, 112 Pac. 845 (1911), aff'd, 232 U. S. 94 (1914); *Hepner v. Libby, McNeill & Libby*, 114 Cal. App. 747, 300 Pac. 830 (1931); *Noxon v. Remington*, 78 Conn. 296, 61 Atl. 963 (1905); *Brause v. Brause*, 190 Iowa 329, 177 N. W. 65 (1920); *Brahammer v. Lager*, 194 S. W. 1072 (Mo. 1917); *Silverglade v. Von Rohr*, 107 Ohio St. 75, 140 N. E. 669 (1923); *Duaine v. Gulf Refining Co.*, 285 Pa. 81, 131 Atl. 654 (1926); *Placalla v. Robbio*, 47 R. I. 180, 131 Atl. 647 (1926); *Miles v. Fall River County*, 50 S. D. 240, 209 N. W. 360 (1926); *Yarrough v. Hines*, 112 Wash. 310, 192 Pac. 886 (1920). See Note (1933) 18 IOWA L. REV. 404.

3. *Becker Bros. v. United States*, 7 F. (2d) 3 (C. C. A. 2d, 1925); *Alabama Co. v. Talmadge*, 207 Ala. 86, 93 So. 548 (1921), writ of error denied, 259 U. S. 575 (1922); *Doroszka v. Lavine*, 111 Conn. 575, 150 Atl. 692 (1930); *Florida East Coast Ry. Co. v. Hayes*, 67 Fla. 101, 64 So. 504 (1914); *North Chicago Street Rr. v. Wrixon*, 150 Ill. 532, 37 N. E. 895 (1894); *Burdick v. Missouri Pacific Ry. Co.*, 123 Mo. 221, 27 S. W. 453 (1894); *Corr v. Omaha*, 122 Neb. 323, 240 N. W. 312 (1932); *Holmes v. Jones*, 121 N. Y. 461, 24 N. E. 701 (1890); *Chester Park Co. v. Schulte*, 120 Ohio St. 273, 166 N. E. 186 (1929); *Barry v. Chester*, 23 Okla. 340, 100 Pac. 519 (1909); *Meenan v. United Electric Rys. Co.*, 153 Atl. 881 (R. I. 1931); *Alabama Great Southern Rr. Co. v. Roberts*, 113 Tenn. 488, 82 S. W. 314 (1904); *Texas & New Orleans Rr. Co. v. Syfan*, 91 Tex. 562, 44 S. W. 1064 (1898); *Belt v. Lawes*, 12 Q. B. D. 356 (1884); *Fleming v. Bank of New Zealand*, [1900] A. C. 577.

4. *Key West Electric Co. v. Higgs*, 136 So. 639 (Fla. 1931); *Lepchenski v. Mobile & Ohio Rr. Co.*, 332 Mo. 194, 59 S. W. (2d) 610 (1932); *Brown v. Southern Pacific Rr. Co.*, 7 Utah 288, 26 Pac. 579 (1891).

5. ALA. CODE ANN. (Michie, 1928) § 6150; ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 3682 (consent of both parties required); ARK. DIG. STAT. (Crawford & Moses, 1919) § 1313; CONN. GEN. STAT. (1930) § 5647; ILL. REV. STAT. (Smith-Hurd, 1933) c. 110, § 216 (1) (f); NEB. COMP. STAT. (1929) § 20-1929; TEX. ANN. CIV. STAT. (Vernon, 1925) arts. 1861, 1862; VA. CODE (Michie, 1930) §§ 6333, 6335.

Occasionally, statutes provide that no new trial may be granted until plaintiff has been offered and has refused an opportunity to remit. See MASS. GEN. LAWS (1932) c. 231, § 127; R. I. GEN. LAWS (1923) c. 348, § 12.

6. *Southern Ry. Co. v. Montgomery*, 46 F. (2d) 990 (C. C. A. 5th, 1931); *Louisville & Nashville Rr. Co. v. Earl*, 94 Ky. 368, 22 S. W. 607 (1893). See *Watt v. Watt* (1905) A. C. 115 [overruling *Belt v. Lawes*, 12 Q. B. D. 356 (1884); *Fleming v. Bank of New Zealand* (1900) A. C. 577].

7. *Tifton, Thomasville and Gulf Ry. Co. v. Chastain*, 122 Ga. 250, 50 S. E. 105 (1905); *City of East Point v. Christian*, 40 Ga. App. 81, 149 S. E. 50 (1929); *Unfried v. Baltimore & Ohio Rr. Co.*, 34 W. Va. 260, 12 S. E. 512 (1890); *Thompson v. Davis Colliery Co.*, 104 W. Va. 493, 140 S. E. 489 (1927).

practise has almost unanimously been upheld<sup>8</sup> as violating neither the Seventh Amendment of the Federal Constitution,<sup>9</sup> which guarantees preservation of the right of trial by jury, nor similar provisions in state constitutions.<sup>10</sup> The power of the court to determine whether the damages awarded are excessive is said necessarily to imply authority to determine an amount that would not be excessive.<sup>11</sup> Consequently, in giving the plaintiff an option to remit the excess or submit to a new trial, the judge is not usurping the function of the jury by arbitrarily fixing the amount of recovery, but is merely indicating the greatest amount which could have been allowed to stand.<sup>12</sup> The plaintiff who has voluntarily accepted the remittitur is not prejudiced and therefore cannot later complain of the court's action.<sup>13</sup> The defendant is deprived of no right, and since he is benefited by the reduction, he cannot object.<sup>14</sup>

Occasionally, courts have arbitrarily reduced a verdict although the plaintiff has not been afforded an opportunity to remit, or even after he has refused to remit. But notwithstanding the undoubted efficacy of such a procedure in preventing plaintiffs from forcing new trials in the hope of recovering larger damages than could be retained by consenting to a remittitur,<sup>15</sup> it has been declared unconstitutional in almost every instance.<sup>16</sup> As a result, if the prevail-

8. *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U. S. 69 (1888); *Alabama Power Co. v. Talmadge*, 207 Ala. 86, 93 So. 548 (1921); *Sewell v. Sewell*, 91 Fla. 982, 109 So. 98 (1926); *Burdick v. Missouri Pacific Ry. Co.*, 123 Mo. 221, 27 S. W. 453 (1894); *Henderson v. Dreyfus*, 26 N. M. 541, 191 Pac. 442 (1919); *Alter v. Shearwood*, 114 Ohio St. 560, 151 N. E. 667 (1926). Also see cases cited notes 2 and 3, *supra*, most of which have assumed the constitutionality of remittiturs to be beyond question.

9. U. S. CONST. AMEND. 7: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

10. Most of the state constitutions merely provide that the right of trial by jury or the right as it heretofore has existed, shall be preserved inviolate. Louisiana has no constitutional guaranty of jury trial in civil cases. See note 46, *infra*.

11. *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U. S. 69, 74 (1888).

12. *Florida East Coast Ry. Co. v. Hayes*, 67 Fla. 101, 109, 64 So. 504, 506 (1914).

13. *National Malleable Castings Co. v. Iroquois Steel & Iron Co.*, 333 Ill. 588, 165 N. E. 199 (1929); *O'Connor v. Pawling & Harnischfeger Co.*, 191 Wis. 323, 210 N. W. 696 (1926). However, statutes in some states allow plaintiffs to remit under protest and preserve a right of appeal. See NEB. COMP. STAT. (1929) § 20-1929; TENN. CODE (1932) § 8988; VA. CODE (Michie, 1930) § 6335.

14. *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U. S. 69, 74 (1888); *Boyer v. Anduiza*, 90 Ore. 163, 175 Pac. 853 (1918) (if any error was committed in reducing the judgment, it was favorable to defendant who cannot complain); *Weatherspoon v. Stackland*, 127 Ore. 450, 271 Pac. 741 (1928).

15. See (1922) 35 HARV. L. REV. 616; Note (1933) 18 IOWA L. REV. 404.

16. *Kennon v. Gilmer*, 131 U. S. 22 (1888); *Johnson v. Louisville & Nashville Rr. Co.*, 204 Ala. 662, 87 So. 158 (1920); *Barber v. Maden*, 126 Iowa 402, 102 N. W. 120 (1905); *Cazzell v. Schofield*, 319 Mo. 1169, 8 S. W. (2d) 580 (1928); *Bourne v. Moore*, 77 Utah 184, 292 Pac. 1102 (1930); *Borowicz v. Hamann*, 193 Wis. 324, 214 N. W. 431 (1927); see *Chester Park Co. v. Schulte*, 120 Ohio St. 273, 290, 166 N. E. 186, 191 (1929).

A few jurisdictions apparently allow courts to correct excesses due to miscalculations

ing party does not agree to remit, the sole recourse of the tribunal is the grant of a new trial.<sup>17</sup>

The function of remittitur in terminating litigation is somewhat impaired by the rule that a verdict excessive because of bias, passion or prejudice<sup>18</sup> may not be reduced by remittitur. A new trial is required because the improper motives of the jury may have led to an incorrect verdict on the question of liability as well as damages.<sup>19</sup> However, a number of jurisdictions sanction remittiturs, in the discretion of the court, even when passion and prejudice are found;<sup>20</sup> others confine the use of remittiturs exclusively to verdicts tainted by passion and prejudice and decline absolutely to interfere with verdicts which are merely excessive.<sup>21</sup> But even where passion and bias do not preclude remittiturs, the

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on the part of the jury, or refusal to follow instructions as to the amount of damages, without requiring consent of the plaintiff. *Wichita & Colorado Ry. Co. v. Gibbs*, 47 Kan. 274, 27 Pac. 991 (1891); *Security Benefit Ass'n v. Kibby*, 220 Ky. 330, 295 S. W. 164 (1927); *Linson v. Barnes*, 136 Okla. 237, 277 Pac. 233 (1929); *Mullin v. Gano*, 299 Pa. 251, 149 Atl. 483 (1930).

17. *Sewell v. Sewell*, 91 Fla. 982, 109 So. 98 (1926); *Plecas v. Devich*, 72 Utah 578, 272 Pac. 197 (1928); cf. *Ralston v. Philadelphia Rapid Transit Co.*, 267 Pa. 278, 110 Atl. 336 (1920). See also, cases cited note 16, *supra*.

The new trial may be restricted to the issue of damages. *May Department Stores v. Bell*, 61 F. (2d) 830 (C. C. A. 8th, 1932); *Porter v. Taylor*, 107 Conn. 68, 139 Atl. 649 (1927); *Beaulieu v. Tremblay*, 130 Me. 51, 153 Atl. 353 (1931); *Vacuum Oil Co. v. Smoolker*, 282 Mass. 361, 185 N. E. 13 (1933); *Lundblad v. Erickson*, 180 Minn. 185, 230 N. W. 473 (1930).

18. Bias and prejudice are not inferable from the mere excessiveness of the verdict, but must be shown by other evidence. *Cook v. Globe Printing Co.*, 227 Mo. 471, 127 S. W. 332 (1910) (verdict for \$150,000 reduced to \$50,000 by trial court held not to indicate bias and prejudice); *Henderson v. Dreyfus*, 26 N. M. 541, 191 Pac. 442 (1919); *Fromson & Davis Co. v. Reider*, 127 Ohio St. 564, 189 N. E. 851 (1934); *Eleganti v. Standard Coal Co.*, 50 Utah 585, 168 Pac. 266 (1917).

19. *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin*, 283 U. S. 520 (1931); *Southern Pacific Co. v. Fitchett*, 9 Ariz. 128, 80 Pac. 359 (1905); *Tunnel Mining & Leasing Co. v. Cooper*, 50 Colo. 390, 115 Pac. 901 (1911); *Wabash Ry. Co. v. Billings*, 212 Ill. 37, 72 N. E. 2 (1904); *Cain v. Osler*, 168 Iowa 59, 150 N. W. 17 (1914); *Leinbach v. Pickwick Greyhound Lines*, 135 Kan. 40, 10 P. (2d) 33 (1932); *Blessing v. Angell*, 66 Mont. 482, 214 Pac. 71 (1923); *Carpenter v. Dickey*, 26 N. D. 176, 143 N. W. 964 (1913).

20. *Reeves v. Catignani*, 157 Tenn. 173, 7 S. W. (2d) 38 (1928); *Brown v. Southern Pacific Ry. Co.*, 7 Utah 288, 26 Pac. 579 (1891); *Matsuda v. Hammond*, 77 Wash. 120, 137 Pac. 328 (1913); *Beach v. Bird & Wells Lumber Co.*, 135 Wis. 550, 558, 116 N. W. 245, 248 (1908).

21. *Hart v. Farris*, 218 Cal. 69, 21 P. (2d) 432 (1933); *Pulsifer v. City of Albany*, 47 S. W. (2d) 233 (Mo. 1931); *Kurpgewit v. Kirby*, 88 Neb. 72, 129 N. W. 177 (1910); *Halverson v. Zimmerman*, 56 N. D. 607, 218 N. W. 862 (1928); *Goodyear Tire & Rubber Co. v. Marhofer*, 38 Ohio App. 143, 176 N. E. 120 (1930); *Miller v. Tennis*, 140 Okla. 185, 282 Pac. 345 (1929); *Western Union Telegraph Co. v. Hicks*, 253 S. W. 565 (Tex. 1923). But cf. *Burdick v. Missouri Pacific Ry. Co.*, 123 Mo. 221, 27 S. W. 453 (1894) and *Chester Park Co. v. Schulte*, 120 Ohio St. 273, 166 N. E. 186 (1929), cited note 3, *supra*. See Note (1933) 18 Iowa L. Rev. 561.

This rule is sometimes codified by statute. See N. D. COMP. LAWS ANN. (Supp. 1925) § 7660(5); TENN. CODE (1932) §§ 8937, 8988; WASH. REV. STAT. ANN. (Remington, 1932) § 399-1.

usefulness of the device is restricted by the frequently reiterated doctrine that if the damages are excessive, but errors are committed in the course of the trial, a new trial must be granted as a matter of right.<sup>22</sup> However, there seems to be an increasing tendency to except from this rule such errors as improper admission of evidence,<sup>23</sup> submission of issues unsupported by evidence,<sup>24</sup> errors in instructions,<sup>25</sup> or misconduct of the jury.<sup>26</sup>

Where the verdict is inadequate rather than excessive, the scope of judicial interference has been more limited. The usual remedy is the setting aside of the verdict and the ordering of a new trial.<sup>27</sup> In many states this may be granted on the ground of mere inadequacy;<sup>28</sup> in some, only where the smallness of the award indicates bias and prejudice;<sup>29</sup> in still others, statutes forbid new trials for inadequacy in actions for injuries to the person or reputation.<sup>30</sup> If a new trial is permissible, a needless retrial of all the issues may be avoided, when the sole objection is to the amount of damages, by limiting it to the issue

22. *Improper admission of evidence*: Silver King of Arizona Mining Co. v. Kendall, 23 Ariz. 39, 201 Pac. 102 (1921); Foley v. Union House Furnishing Co., 60 S. W. (2d) 725 (Mo. 1933). *Submission of issues unwarranted by evidence*: Kimmie v. Terminal Rr. Ass'n of St. Louis, 66 S. W. (2d) 561 (Mo. 1933); Holmes v. Jones, 121 N. Y. 461, 24 N. E. 701 (1890). *Incorrect instruction*: Smothers v. Chicago, Rock Island & Pacific Ry. Co., 15 S. W. (2d) 884 (Mo. 1929); Texas Cities Gas Co. v. Ellis, 63 S. W. (2d) 717 (Tex. 1933).

23. Chicago, Rock Island & Pacific Ry. Co. v. Batsel, 100 Ark. 526, 140 S. W. 726 (1911); Martin v. Pacific Gas & Electric Co., 255 Pac. 284 (Cal. 1927); Simmons v. Wilkin, 80 Utah 362, 15 P. (2d) 321 (1932). But see note 22, *supra*.

24. Volay v. Williams, 258 Mich. 184, 241 N. W. 846 (1932).

25. Union Traction Co. v. Cameron, 85 Ind. App. 629, 155 N. E. 265 (1927); Weaver v. People's Motor Coach Co., 237 Mich. 274, 211 N. W. 625 (1927); Price v. Cerelleo, 135 Atl. 660 (N. J. 1927); Findel v. Chester, 169 Wash. 151, 13 P. (2d) 442 (1932); Bump v. Voights, 212 Wis. 256, 249 N. W. 508 (1933).

26. Bilbo v. Lewis, 45 S. W. (2d) 653 (Tex. 1931).

27. See (1929) 15 VA. L. REV. 592.

28. Peri v. Culley, 119 Cal. App. 117, 6 P. (2d) 86 (1931); De Moss v. Brown Cab Co., 254 N. W. 17 (Iowa 1934); Simmons v. Fish, 210 Mass. 563, 97 N. E. 102 (1912); Stegner v. Missouri-Kansas-Texas Rr. Co., 64 S. W. (2d) 691 (Mo. 1933); Degnan v. Ranchod, 154 Atl. 528 (N. J. 1931); Daigle v. Rudebeck, 154 Wash. 536, 282 Pac. 827 (1929).

To the same effect are the following statutes: ALA. CODE ANN. (Michie, 1928) § 9518(4); MASS. GEN. LAWS (1932) c. 231, § 128; TEX. ANN. CIV. STAT. (Vernon, 1925) art. 2235; VA. CODE (Michie, 1930) § 6260; W. VA. CODE (1932) § 56-6-28.

29. Jackson v. Roddy, 224 Ala. 132, 139 So. 354 (1932); Anglin v. City of Columbus, 128 Ga. 469, 57 S. E. 780 (1907); Conroy v. Reid, 168 Atl. 215 (Me. 1933); Jenkins v. Hankins, 98 Tenn. 545, 41 S. W. 1028 (1897).

See also ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 3847(5); KAN. REV. STAT. ANN. (1923) § 60-3001(3); MINN. STAT. (Mason, 1927) § 9325(5); WASH. REV. STAT. ANN. (Remington, 1932) § 399(5).

30. ARK. DIG. STAT. (Crawford & Moses, 1919) § 1312; IND. STAT. ANN. (Burns, 1926) § 611; OKLA. STAT. (1931) § 399.

of damages, a procedure frequently authorized by decision<sup>31</sup> or statute.<sup>32</sup> But even here a new trial may be denied when the verdict is so inadequate as to indicate that the jury concluded that the defendant was not liable but compromised by allowing nominal damages in order that costs might not be taxed against the plaintiff.<sup>33</sup>

Partial new trials and denial of new trials are, however, unsatisfactory solutions to the problem of expediting judicial administration and at the same time correcting inadequate verdicts. In a recent case, a federal district court adopted a procedure which seems satisfactorily to accomplish both ends. The plaintiff instituted a common law action for personal injuries; the jury found the defendant liable but awarded a verdict for only \$500. In ruling on plaintiff's motion for a new trial on the ground of inadequacy of damages, the trial court ordered that the motion be granted unless defendant stipulated to an increase in damages of \$1000 over the amount of the verdict. Defendant consented to the increase and a new trial was denied. On appeal by the plaintiff, the circuit court of appeals held the course pursued by the district court unconstitutional.<sup>34</sup> It reasoned that such action was unsupported by precedent and constituted, therefore, a re-examination, in a manner unknown at common law, of a fact tried by a jury, within the language of the Seventh Amendment.<sup>35</sup>

Even on the limited ground that no common law precedent existed for such a re-examination, the court's conclusion seems questionable. Such an order, which by analogy may be termed an additur, was entered in an English case decided in 1843;<sup>36</sup> dicta in modern cases<sup>37</sup> and references by an early text-writer<sup>38</sup> indicate that the practise was not unknown in English common law, which is the "common law" of the Seventh Amendment.<sup>39</sup> But apart from the

31. *Gasoline Products Co. v. Champlin Refining Co.* 283 U. S. 494 (1931) (partial new trials held constitutional); *Mathewson v. Colpitts*, 188 N. E. 601 (Mass. 1933); *Busse v. White*, 287 S. W. 600 (Mo. 1926); *Lisbon v. Lyman*, 49 N. H. 553 (1870); *Robinson v. Payne*, 99 N. J. Law 135, 122 Atl. 882 (1923); *Howell v. Murdock*, 156 Va. 669, 158 S. E. 886 (1931). *Contra*: *McKeon v. Central Stamping Co.*, 264 Fed. 385 (C. C. A. 3rd, 1920); *Krummen Motor Bus & Taxi Co. v. Mechanics' Lumber Co.*, 175 Ark. 750, 300 S. W. 389 (1927). Cf. cases cited note 17, *supra*, granting partial new trials for excessive damages. See Note (1920) 34 HARV. L. REV. 71.

32. ARIZ. REV. CODE (Struckmeyer, 1928) § 3852; CONN. GEN. STAT. (1930) § 5695; FLA. COMP. GEN. LAWS ANN. (1927) § 4640; ILL. REV. STAT. (Smith-Hurd, 1933) c. 110, § 216 (1) (f); KAN. REV. STAT. ANN. (1923) § 60-3004; MD. ANN. CODE (Bagby, 1924) art. 5, § 25; MASS. GEN. LAWS (1932) c. 231, § 128; WYO. REV. STAT. (1931) § 89-4803.

33. *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U. S. 474 (1932); *Donnatin v. Union Hardware & Metal Co.*, 38 Cal. App. 8, 175 Pac. 26 (1918); *Johnson v. Franklin*, 112 Conn. 228, 152 Atl. 64 (1930); *Rubinson v. Des Moines City Ry. Co.*, 191 Iowa 692, 182 N. W. 865 (1921); *Maki v. St. Luke's Hospital Ass'n*, 122 Minn. 444, 142 N. W. 705 (1913); *Snyder v. Portland Ry, Light & Power Co.*, 107 Ore. 673, 215 Pac. 887 (1923).

34. *Schiedt v. Dimick*, 70 F. (2d) 558 (C. C. A. 1st, 1934).

35. For the text of the Seventh Amendment, see note 9, *supra*.

36. *Armytage v. Haley*, 4 Q. B. 917 (1843). A rule was obtained to show cause why a new trial should not be had unless defendant would consent to an increase in damages.

37. See *Belt v. Lawes* 12 Q. B. D. 356, 358 (1884) and cases cited note 49, *infra*.

38. BULLER'S NISI PRIUS (1806) 21.

39. *Capital Traction Co. v. Hof*, 174 U. S. 1, 8 (1899).



question of authority for the use of additurs, the court was confronted with abundant precedent<sup>40</sup> for the seemingly analogous practise of granting remittiturs and as a result was compelled to distinguish the consequences of additurs and remittiturs. The majority of the court argued that in the case of a remittitur the jury, although awarding an erroneously excessive verdict, in so doing has passed on the amount to which the damages are reduced, while in an additur, no jury has ever approved the increased amount. Therefore, the plaintiff is said to be deprived of a jury trial on the question of damages, even though he recovers more than the allowance of the jury.<sup>41</sup> In drawing this technical distinction, the decision seems in conflict with the purpose of the Seventh Amendment. This purpose the Supreme Court has repeatedly declared to be the preservation of the substance of trial by jury, not the traditional forms of procedure.<sup>42</sup> Viewed in the light of that purpose the distinction is plainly without basis. In the case of remittitur, the damages which the defendant must pay are reduced to an amount smaller than that found by the jury; in the case of an additur, the plaintiff recovers damages larger than the amount deemed by the jury to be reasonable. In neither case is the quantum of recovery fixed by the jury retained. Hence, if a remittitur is not regarded as a substantial deprivation of trial by jury on the question of damages, an additur cannot realistically be so regarded.<sup>43</sup> Moreover, it is difficult to perceive how the plaintiff's interests are prejudiced to any greater degree by an additur than are the defendant's by a remittitur; the loss occasioned by denial of the chance of securing a more favorable verdict from a second jury on retrial is the same in either case.

In view of the tenuous ground on which the decision rests, other federal courts may refuse to follow the holding of the circuit court of appeals, especially since the allowance of additurs will "advance the cause of justice, end litigation and lessen the expense," as the majority opinion conceded.<sup>44</sup> However, even if the view that additurs are unconstitutional eventually prevails in the federal courts, this rule will not be binding on the state courts, which are not controlled by the Seventh Amendment to the Federal Constitution.<sup>45</sup> Furthermore, the provisions of state constitutions offer no bar to the allowance of additurs by state courts. The principal objection to the validity of additurs in the federal courts is interposed by the clause of the Seventh Amendment which states that "no fact tried by the jury shall be otherwise re-examined . . . than

40. See cases cited notes 2, 3, 4, and 8, *supra*.

41. *Schiedt v. Dimick*, 70 F. (2d) 558, 561, 562 (C. C. A. 1st, 1934).

42. *Walker v. New Mexico & Southern Pacific Rr. Co.*, 165 U. S. 593, 596 (1897); *Gasoline Products Co. v. Champlin Refining Co.*, 283 U. S. 494, 498 (1931). In the latter case, the Supreme Court sustained the constitutionality of granting partial new trials, even though no such practise existed at common law, on the ground that "the Seventh Amendment does not exact the retention of old forms of procedure." This reasoning would seem equally applicable to the instant case.

43. See dissenting opinion of Morton, J., in *Schiedt v. Dimick*, 70 F. (2d) 558 (C. C. A. 1st, 1934).

44. Cf. *Gasoline Products Co. v. Champlin Refining Co.*, 283 U. S. 494 (1931) and note 42, *supra*.

45. *Walker v. Sauvinet*, 92 U. S. 90 (1876); *Pearson v. Yewdall*, 95 U. S. 294 (1877).

according to the rules of the common law." Most state constitutions do not contain this or any similar clause, but merely provide that the right of trial by jury shall remain inviolate.<sup>46</sup> Thus the state courts are relieved from the necessity of determining whether or not an additur is a method of re-examination of a fact tried by a jury unknown at common law. It is this difference in the language of the federal and state constitutions which has enabled many state courts to render judgments non obstante veredicto when a directed verdict has been improperly refused below,<sup>47</sup> although this procedure has been outlawed in the federal courts under the Seventh Amendment.<sup>48</sup>

Nevertheless, few state courts have availed themselves of the opportunity to grant additurs, notwithstanding the apparent absence of constitutional barriers against their use.<sup>49</sup> And in some of the scattered jurisdictions where additurs are allowed, they are utilized only to correct the omission of specific calculable items of damage.<sup>50</sup> One state, however, has adopted a method of dealing with inadequate verdicts that seems very desirable. Under the Wisconsin practise, a new trial will be ordered unless plaintiff consents to take judgment for the

46. See note 10, *supra*. However, re-examination clauses similar to that of the seventh amendment are found in ORE. CONST. art. 1, § 17; W. VA. CONST. art. 3, § 13.

47. *Wayland v. Latham*, 89 Cal. App. 55, 264 Pac. 766 (1928); *Bothwell v. Boston Elevated Ry. Co.*, 215 Mass. 467, 102 N. E. 665 (1913); *Vandenburg v. Kaat*, 252 Mich. 187, 233 N. W. 220 (1930); *Kernan v. St. Paul City Ry. Co.*, 64 Minn. 312, 67 N. W. 71 (1896); *Gulf & Ship Island Rr. Co. v. Hales*, 140 Miss. 829, 105 So. 458 (1925); *Roe v. Standard Furniture Co.*, 41 Wash. 546, 83 Pac. 1109 (1906). Judgments non obstante veredicto are often authorized by statute: IDAHO CODE ANN. (1932) § 7-602(8); ILL. REV. STAT. (Smith-Hurd, 1933) c. 110, § 192; MASS. GEN. LAWS (1932) c. 231, §§ 122, 123; MICH. COMP. LAWS (1929) §§ 14531, 14532; MINN. STAT. (Mason, 1927) § 9495; OHIO GEN. CODE (Page, 1931) § 11601; PA. STAT. ANN. (Purdon, 1930) tit. 12, §§ 681, 686.

48. *Slocum v. N. Y. Life Insurance Co.*, 228 U. S. 364 (1913); *Young v. Central Rr. of N. J.*, 232 U. S. 602 (1914); See Comment (1929) 38 YALE L. J. 971.

49. *Gaffney v. Illingsworth*, 90 N. J. Law 490, 101 Atl. 243 (1917) and *Clausing v. Kershaw*, 129 Wash. 67, 224 Pac. 573 (1924) appear to be the only cases squarely upholding the validity of additurs as a method of correcting generally inadequate verdicts. Cf. *Morrell v. Gobeil*, 84 N. H. 150, 147 Atl. 413 (1929) (trial court ordered new trial unless defendant consented to increase. Defendant refused; verdict set aside. On appeal, judgment reversed because verdict not inadequate. Validity of additur apparently assumed); see *Larkins v. Ohio Electric Ry. Co.*, 4 Ohio App. 37, 44 (1914) (dictum that additur proper when damages not speculative); *American Ry. Express Co. v. Bender*, 20 Ohio App. 436, 441, 152 N. E. 197, 198 (1926) (implication that additur with consent of defendant is permissible).

50. *Adamson v. County of Los Angeles*, 52 Cal. App. 125, 198 Pac. 52 (1921); *Carr v. Miner*, 42 Ill. 179 (1866); *James v. Morey*, 44 Ill. 352 (1867); *E. Tris Napier Co. v. Gloss*, 150 Ga. 561, 104 S. E. 230 (1920); *Clark v. Henshaw Motor Co.*, 246 Mass. 386, 140 N. E. 593 (1923).

In cases of omission of calculable items, a few appellate courts increase damages to conform to the evidence, even without the consent of defendant. *Carroll Oil & Gas Co. v. Johnson*, 229 Ky. 574, 17 S. W. (2d) 717 (1929); *Stagg v. Broadway Garage Co.*, 87 Mont. 254, 286 Pac. 415 (1930). In Louisiana, which has no constitutional guaranty of jury trial, the courts increase any unreasonably inadequate verdict. *York v. Starns*, 14 La. App. 548, 129 So. 226 (1930).

least,<sup>51</sup> or defendant consents to judgment for the greatest<sup>52</sup> sum an impartial jury reasonably could award.<sup>53</sup> Thus, either party is enabled to prevent a new trial for inadequacy.<sup>53</sup> It has been asserted that this method may be ineffective, since each party will prefer to take the risk of a new trial rather than the alternative offered.<sup>54</sup> But it seems probable that one of the parties would be sufficiently cognizant of the delay and increased costs of a new trial to accept the option tendered by the court and thus terminate litigation.

## STATE TAXATION AND REGULATION OF THE TENNESSEE VALLEY AUTHORITY

By the passage of the Boulder Canyon Project Act<sup>1</sup> in 1928 the federal government took its first step into another field of private industry, the electric power business, and thus after a long and bitterly contested struggle, openly launched a new national power policy.<sup>2</sup> On May 18, 1933 the government set out on the second phase of this program by the creation of the Tennessee Valley Authority<sup>3</sup> as a government owned corporation to take over and operate the properties of the United States at Muscle Shoals.<sup>4</sup> A far-sighted experimental

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51. *Risch v. Lawhead*, 211 Wis. 270, 248 N. W. 127 (1933).

52. *Reuter v. Hickman, Lauson & Diener Co.*, 160 Wis. 284, 151 N. W. 795 (1915).

53. A similar procedure is followed in the case of excessive damages. See *Campbell v. Sutliff*, 193 Wis. 370, 214 N. W. 374 (1927) for description and policy of the Wisconsin method.

54. Note (1933) 18 *Iowa L. Rev.* 404.

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The constitutionality of the Tennessee Valley Authority Act and the legality of the operations of the Authority under it are assumed throughout this comment [see Comment (1934) 43 *YALE L. J.* 815]; otherwise the problems of state taxation and regulation would appear to be moot. But compare the recent statement of Judge Grubb in *Ashwander v. Tennessee Valley Authority*, U. S. D. C., N. D. Ala., Nov. 28, 1934, denying a motion to dismiss a bill against the Authority based on unconstitutionality of the Act and illegality of the Authority's activities: "If the Tennessee Valley Authority, within this state, is engaging in a proprietary venture, unrelated to any power conferred upon it or on its principal by the constitution, then it is doing an unauthorized thing. Engaging in the business of producing and selling electric power, as a utility . . . it would become subject to state regulation . . ." Quaere, whether in such a case the TVA could continue to operate as a utility.

1. 45 *STAT.* 1057 (1928), 43 U. S. C. A. § 617 (Supp. 1933).

2. The Secretary of the Interior was directed to make long term contracts for the sale of the entire estimated output at the switchboard before the work was begun. Only slight control was to be exercised beyond that point. Cf. *THE HOOVER DAM CONTRACTS*, U. S. Government Printing Office (1933).

3. Tennessee Valley Authority Act, P. L. No. 17, 73rd Cong., 1st Sess. (1933), 16 U. S. C. A. Supp. § 831 (1933).

4. These consist of the Wilson Dam and two nitrate plants, together with all real estate, buildings, machinery, and other accessories, and are entrusted to the corporation for the purposes of this act as agent of the United States.

program of regional planning was entrusted to the Authority, the principal objectives in the field of power development being to popularize the use of electricity by the sale of cheap power, and to provide a "yardstick" with which to compare the relative advantages of private and public ownership and operation.<sup>5</sup> Since then a number of other federal power projects have been begun, the most important being the Grand Coulee and Bonneville dams on the Columbia River, and the Fort Peck Dam on the upper Missouri.<sup>6</sup> Plans for a huge project on the St. Lawrence River are awaiting the negotiation of a treaty with Canada.<sup>7</sup> It has been estimated that the national government is proposing to spend over a billion dollars on federal power projects within the next decade and that three hundred million dollars has been spent or contracted for already.<sup>8</sup> These new sources will add enormously to the present capacity, which is already in excess of present needs;<sup>7</sup> and President Roosevelt has stated that the national government shall be the perpetual owner.<sup>8</sup> Although no definite plans have been made public with regard to the method which the government intends to pursue in the distribution of this enormous amount of power, there are a number of indications that a program similar to that developed in the Tennessee valley will be followed in the development of the newer projects.<sup>9</sup> The novel

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5. See Lilienthal, *Business and Government in the Tennessee Valley*, TVA Press Release, Jan. 6, 1934, at 3, and Address of Lilienthal, TVA Press Release, April 25, 1934, at 3.

6. See *Federal Funds for Power*, ELECTRICAL WORLD, Sept. 29, 1934, at 32, and *The Facts about The Billion Dollar Water Power Development of the Federal Government*, (pamphlet) National Coal Association, August, 1934. The TVA is at present building two more large dams, the Norris Dam on the Clinch River and the Wheeler Dam, estimated to cost \$34,000,000 and \$20,000,000 respectively, and is doing preliminary work on four smaller run of the river dams. TVA Press Release, May 18, 1934.

7. SURVEY OF THE GREAT LAKES-ST. LAWRENCE SEAWAY AND POWER PROJECT, (U. S. Government Printing Office 1934). President Roosevelt speaks of a fourth yardstick and plans to lay a treaty before the Senate this winter differing in some respects from that rejected last year. U. S. News, Oct. 8, 1934, at 14, col. 7.

8. Speech at Bonneville Dam, Aug. 1934, ELECTRICAL WORLD, Aug. 11, 1934, at 187. The TVA has no authority to sell or otherwise dispose of real property. Tennessee Valley Authority Act, *supra* note 3.

9. In his message transmitting the Tennessee Valley Authority Act to Congress the President stated that if this program was successful it could be utilized in a like development of other projects. 77 CONG. REC. 1423 (1933). He has indicated recently that a wide expansion of the plan is contemplated. N. Y. Times, Oct. 17, 1934, at 18, col. 5; N. Y. Times, Nov. 19, 1934, at 3, col. 1. Also a number of bills were introduced during the last session of Congress, contemplating similar developments in other areas. 78 CONG. REC. 25 (1934), H. R. 6224 by Mr. Hastings, proposing the creation of the Arkansas Valley Authority; 78 CONG. REC. 56 (1934), S. 1973 by Mr. Norris, proposing a similar development of the Missouri and Mississippi Valleys; 78 CONG. REC. 133 (1934), H. R. 6368 by Mr. Marland, concerning the development of the Arkansas River; 78 CONG. REC. 9067 (1934), H. R. 9669 by Mr. Greenwood concerning the development of the Wabash and White Rivers. Senator Dill of Washington is apparently backing the creation similarly of a Columbia Valley Authority to operate the Bonneville and Grand Coulee Dams (cf NEW OUTLOOK, July, 1934, at 48-52) and proponents of the St. Lawrence project are asking for a federal corporation on the lines of the TVA to take charge of it. U. S. News, Oct. 8, at 664, col. 7. The first example of this type of administrative device was created

problems which confront the Tennessee Valley Authority and the legal questions raised by its operation are thus representative of those which must be faced by the United States government in its ambitious program of developing under government ownership and control the power resources of the nation.

The TVA is, in the words of the President, a "corporation clothed with the power of government, but possessed of the flexibility and initiative of a private enterprise."<sup>10</sup> Its entire stock is owned by the United States, and it is controlled by a board of three members with large discretionary powers. Aside from the ordinary corporate powers, including that of suing and being sued, it may exercise the power of eminent domain in the name of the United States, is to have access to the patent office for the purpose of using new inventions, the cooperation of the departments of the federal government, and the franking privilege. It is directed to acquire or build facilities for the generation, transmission, and sale of electric power at as low rates as possible and with the object of extending its use; to give preference to states, counties, municipalities, and cooperative organizations over private companies; and to insert in contracts at wholesale a provision that the consumer rates shall be satisfactory to it. Armed with these powers the Authority has successfully set up an area in which to carry on its operations in the power industry. In response to the requests of two hundred municipalities for cheap TVA power, the Authority has contracted for the purchase of all the electric properties of several private utilities within a large area the size of which was in large measure determined by the amount of the available power produced at the Wilson Dam. These contracts provide for non-competitive territorial agreements and for interchange agreements, and are to terminate upon completion of the Norris Dam or at the end of five years, whichever occurs first.<sup>11</sup> The TVA rate schedule, which ranges from 40% to 60% lower than the rates heretofore charged by the private companies,<sup>12</sup> is expected to induce sufficient increase in the use of electricity to result in a profit. To further stimulate this necessary increase, another corporation, the Electric Home and Farm Authority, a subsidiary of the TVA with the same directors, was created by executive order to organize and carry out an intensive sales campaign of cheap electric appliances on easy credit terms.<sup>13</sup>

This ambitious program raises practical issues of the first importance. If the Authority is to be exempt from taxation by states and local bodies,<sup>14</sup> and

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in New York state in 1931, and the TVA is closely analogous to it in almost all respects. See N. Y. Laws 1931, c. 772. The creation of such agencies to take charge of the new federal projects seems quite probable, for it is doubtful whether the method followed at Boulder Dam of contracting for the sale of power at the dam would be satisfactory because of present surplus capacity in these relatively thinly populated areas.

10. Message to Congress, *supra*, note 9.

11. TVA Press Releases, Jan. 5, 1934, and July 17, 1934.

12. TVA Press Releases, July 17, 1934, and June 3, 1934. For the contract between the TVA and the city of Tupelo, Miss., for the sale of power, see TVA Press Release Nov. 7, 1933.

13. Lillienthal, *Business and Government in the Tennessee Valley*, TVA Press Release, Jan. 6, 1934.

14. Such a result may be reached under the general doctrine that the states may not tax the agents or instrumentalities of the federal government. See notes 59-64, *infra*.

if it should insist upon the enjoyment of that exemption, the consequent withdrawal of large amounts of formerly taxable real estate and other property, would cause sharp reductions in governmental revenues; for the Authority is taking over large areas for flowage purposes and dams, and considerably more for towns, roads, fertilizer plants, and electrical facilities. Moreover, the revenue formerly produced by taxing the private electric utilities will be reduced insofar as the Authority invades the field. As a result of these reductions in the tax base, a greater share of the tax burden would necessarily be placed upon the remaining subjects, among them the Authority's privately-owned competitors. Yet these competitors, including the electric utilities, fertilizer companies, and coal, gas and ice companies, will doubtless find that their ability to carry any extra tax burden is greatly impaired by the competition of the TVA. Indeed, to exempt the Authority from state taxation would provide an insurmountable competitive advantage, of which it could avail itself; whereas to subject it to such taxation would merely be to force it to share the burden of the cost of the facilities and protection which the state affords to all. Subjection to state taxation would, moreover, be necessary if the TVA is truly to perform a "yardstick" function. On the other hand such a subjection might well open the door to subtle discriminations against the Authority's operations and properties.<sup>15</sup> And although a hostile state or county could not constitutionally tax the Authority out of existence or openly discriminate against it,<sup>16</sup> the various tax policies might well hamper and burden certain activities to such an extent as to impair the ability of the Authority to carry out its program. Furthermore, if the Authority is unable to finance itself and is supplied with federal funds, such taxation would increase the burden of the federal taxpayers.

The issues thus raised regarding taxation of the Authority arise in even more complex and pressing form with respect to the power of the states, through their public service commissions, to regulate and control the utility operations of the Authority. The commissions of both Alabama and Tennessee have recently attempted to exercise jurisdiction over the TVA. At a hearing before the Alabama Public Service Commission, held for the purpose of passing on the sale of utility properties of the Alabama Power Company to the Authority, intervening coal and ice companies opposed the legality of the transfer on the ground that the Authority had not obtained a certificate of convenience and necessity and had not qualified under Alabama law. The Commission in approving the transaction found that the Authority was operating a public utility, and held that, although a federal agency, it was exercising "proprietary" as opposed to "governmental" functions, and as such was subject to the laws of Alabama and the regulations of the commission. The Authority was then ordered to file rate and service schedules and otherwise to comply with Alabama law.<sup>17</sup> And recently the Tennessee Railroad and Public Utility Commission

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15. Local property assessments are notoriously unequal.

16. The due process and equal protection clauses of the Constitution would be sufficient protection against such taxes.

17. *Re Alabama Power Co.* 4 P. U. R. (N. S.) 233 (1934). On June 1, 1934, the Commission approved the sale of the properties of the Alabama Power Co. to the TVA

approved the sale of Knoxville properties of the Tennessee Electric Company to the Authority, explicitly reserving its jurisdiction over the Authority.<sup>18</sup> During the hearing the Commission issued a subpoena to Director Lilienthal. He refused to comply, however, and appearing voluntarily the next day stated that the Authority could not constitutionally submit to the jurisdiction of the state commission.<sup>18</sup> This same position was taken in a letter from Mr. Lilienthal to the Alabama commission.<sup>17</sup>

Such withdrawal from state jurisdiction of the properties purchased and operated by the Authority could have a severe reaction on the entire system of state commission control. For the sale to the Authority, forced by threat of direct competition, of all of a private utility's properties within certain areas might well leave the utility with a system which a reduced volume of business without a like reduction in generating capacity and overhead had rendered inefficient and unprofitable. Moreover, upon completion of the dams now under construction the Authority plans to extend its operations beyond its present territory, and thus may come into direct competition with private power companies. In such an event the latter may insist that they be permitted to lower their rates below cost in the competitive areas,<sup>19</sup> and perhaps also to raise their charges proportionately in the rest of the state. Thus in many ways the Authority's activities may impair the state commission's ability

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as specified in the contract of Jan. 4 (see note 11, *supra*) without raising the question of jurisdiction. 4 P. U. R. (N. S.) 225 (1934). On rehearing sought by intervening coal and ice companies the contracts were again approved in the above order. This decision was appealed by both interveners and the Alabama Power Co., and on September 4th was reversed and sent back for rehearing on the ground that due notice of the original hearing had not been given to interested parties in accordance with the statute. *PUBLIC UTILITIES FORTNIGHTLY*, September 27, 1934, at 432. Later when the Commission was considering a motion to subpoena the directors of the TVA, Mr. Lilienthal wrote them a letter denying the jurisdiction of the commission but expressing a wish to cooperate. In consenting to appear voluntarily he made the stipulation that: "Neither directly nor indirectly will our participation be construed as consent to your jurisdiction to regulate or control the TVA." *U. S. News*, Oct. 22, 1934, at 698, col. 7.

18. *N. Y. Times*, Oct. 10, 1934, at 6, col. 6, and Oct. 11, 1934, at 35, col. 6. The order stated that the approval should "not be treated as conceding or yielding to the Tennessee Valley Authority or to the Federal Government any of the rights, powers, jurisdiction or authority of the State as the sovereign over the properties involved." *N. Y. Times*, Oct. 27, 1934, at 21, col. 1. See *In re Tennessee Electric Power Co.*, 2 P. U. R. (N. S.) 4 (1934), in which the commission approved the contract of sale of Jan. 4, 1934, (see note 11, *supra*) with the same reservations. An attempt by interveners to hold up the Knoxville transfer until the constitutionality of the TVA could be settled was successful, and prevented the transfer of the properties on October 31, which was the final date set in the contract. Thus the entire deal has been called off and Knoxville is now proceeding with its plan of building its own distributing system under a \$2,600,000 loan and grant from the PWA, and of selling TVA power in direct competition with the Tennessee Public Service Company. *N. Y. Times*, Nov. 3, 1934, at 21, col. 7.

19. A somewhat similar situation was presented to the Ohio Public Utilities Commission recently when the private utility serving the town of Oberlin sought the Commission's approval of a reduction in its rates of nearly 50% in order to allow it to compete with a new municipal plant which apparently was not under the commission's control. This

to assure consumers all over the state of adequate service at reasonable rates and to assure the utilities of a fair return on their investments. And finally, individual citizens, organizations and municipalities in areas served only by the Authority would have no recourse to an impartial body in case of claims of discriminations, disagreements as to rates or services, or extensions of new lines, unless the state commissions may have jurisdiction; for resort to the courts is a remedy beyond the means of most.<sup>20</sup>

But there are weighty reasons for exempting the Authority from the jurisdiction of the state commissions.<sup>21</sup> Even if the TVA were not required to secure a certificate of convenience and necessity,<sup>22</sup> the commissions would have extensive control over all its operations, with disastrous consequences for the Authority. Under state laws the commissions could refuse to approve of purchases, leases and extensions; could prescribe rates and terms of service; could exercise control over accounting practices, security, and reserves; could examine the records and the properties, and inquire into the management; and could charge inspection and supervision fees.<sup>23</sup> This control would be exercised by each state in which the Authority was able to operate with regulations varying from state to state according to the policy of its commission. Each commission would undoubtedly be subjected to strong pressure by the power interests and perhaps from political sources, and might even be given a mandate by the state legislature respecting the state's policy toward the

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rate reduction was refused on the ground that it would result in operation below cost. *PUBLIC UTILITIES FORTNIGHTLY*, Oct. 11, 1934, at 493. Later a reduction to the level charged by the municipal plant was permitted. *PUBLIC UTILITIES FORTNIGHTLY*, Oct. 25, 1934, at 546. See Comment (1933) 43 *YALE L. J.* 114. This same situation may arise if Knoxville proceeds to build and operate its own plant in competition with the private utility. See note 18, *supra*.

20. This point was stressed by the Alabama commission in its opinion holding the Authority subject to its jurisdiction. See note 17, *supra*.

21. The Authority apparently does not claim that the commissions have no jurisdiction to interfere with its program indirectly by refusing their approval of contracts of purchase or the terms of such contracts regarding territorial or interchange agreements. But though it has not yet raised the issue, it may in the future. For considerable power to block the Authority's program remains in the commissions if they can refuse to allow state companies to sell their properties to the Authority or to reduce the rates charged by them in the retailing of TVA power. The federal act contemplates distribution of power through cooperative organizations also, which the commission could prevent by refusing to give them certificates of convenience and necessity, or hamper by prescribing their rates. The Authority apparently relies on its power to build its own system if all other methods fail, and perhaps with that possibility always present the commissions will approve its arrangements. The New York Power Authority Act recognizes the difficulties implicit in the jurisdiction of the regulative over the competitive body, and exempts all activities of its Authority from the provisions of the public service law and the jurisdiction of the commission. N. Y. Laws 1931, c. 772, § 18.

22. The Alabama Commission apparently considered the federal act a sufficient certificate of necessity, and merely ordered the filing of rate schedules and compliance in general with Alabama law. See note 17, *supra*.

23. ALA. CODE (1928) §§ 9740-9824, and TENN. CODE (1932) §§ 5380-5503.



Authority.<sup>24</sup> Such control over the Authority would unquestionably impair its ability to carry out the purposes of Congress and conceivably might result in defeating the entire program.

A decision on these problems of inter-governmental relations on realistic grounds must be based on the position taken on the fundamental issue of public versus private ownership and control of the power industry, and, if there is to be public ownership, on the issue whether it should be undertaken by the federal or local governments. If the opponents of public ownership are correct in their contention that it has proved more costly and inefficient<sup>25</sup> and that government competition is unprincipled and destructive of our social system<sup>26</sup> it would seem wiser to discourage it. Thus the TVA might be placed on the same level as private utilities and its detrimental consequences minimized by the exercise of state jurisdiction to tax and regulate. In this way the Authority's distasteful regulatory function could be limited while at the same time it is left to work out its "yardstick" rates under the same conditions as the privately owned utilities. But the climate of opinion seems to be otherwise. The feeling that the commission system of regulation has been a failure has gained considerable momentum, and there have been a number of flagrant examples of its abuse.<sup>27</sup> Due in part, perhaps, to this failure, the federal, state, and local governments have taken over numerous services, and with apparent success.<sup>28</sup> Moreover, the results of experiments in government ownership and operation of the electric power industry in this country as well as in foreign nations have been so successful that it may almost be said to be beyond the

24. If a federal corporation on the same lines as the TVA is placed in charge of the St. Lawrence project as proposed (see note 9, *supra*), it would come into direct conflict with the New York Power Authority and the policy of the state, which is expressed in the act to be that natural resources within the state are "inalienable to, and ownership, possession, and control thereof, shall always be vested in the people of the state." N. Y. Laws (1931) c. 772, § 1.

25. See PERSONS, *GOVERNMENT EXPERIMENTATION IN INDUSTRY* (1934); *Government Ownership*, address by Secretary Hoover, Sept. 24, 1924.

26. This contention is based on the fact that the public organization does not pay taxes or dividends and may fall back on government funds. In the case of the Authority there are additional advantages. It may escape the costs imposed by the regulatory bodies; it enjoys the cooperation of other federal departments and agencies and the backing of federal credit with its low interest; its mail is franked; it receives cut rates on freight from the railroads, and its employees are carried at reduced rates; and finally it has the powerful prestige of the United States behind it. N. Y. Times, Nov. 1, 1934, at 31, col. 3. N. Y. Herald-Tribune, Editorial, Nov. 1, 1934, at 16, col. 1.

27. For example, see the disclosures concerning Senator Thayer of New York, 138 NATION 400, Apr. 11, 1934; and compare the Insull scandal (1933) 15 WORLD TOMORROW 343.

28. Municipalities have undertaken a great variety of services such as supplying water, gas, and electricity. See THOMPSON, *PUBLIC OWNERSHIP* (1925) pp. 204-334. States have owned and operated banks, public elevators, mills and insurance companies. THOMPSON, *op. cit. supra*, at 176-204. The federal government owns and runs various enterprises in connection with the reclamation service and the public domain; the post office, coast guard, and weather bureau; the Panama and Alaskan railroads; and the largest printing office in the world. THOMPSON, *op. cit. supra*, at 20-72.

experimental stage.<sup>29</sup> Although there are many examples of public power systems in the United States, they are for the most part local undertakings carried on on a small scale. The Tennessee Valley experiment, being the first example of large scale development under federal control, is open to objections not applicable to the others. It is argued that control should remain in the hands of local bodies who know local conditions and are responsible to the people there, and to whom complaints can be made directly instead of through a mass of red tape surrounding a central organization miles away in Washington. But if any large scale development of the nation's resources is to be undertaken by public bodies the federal government is obviously the most appropriate agency for the purpose. In addition to its greater resources, its projects do not have to conform to political boundary lines, and in the development of an efficient public super-power network the full utilization of the distributing area is a practical necessity.<sup>30</sup> These considerations lead to the conclusion that the national program is basically sound, and therefore it should not be exposed to possible sabotage or interference by local political groups.

Weight is added to the argument for unfettered federal operation of the Tennessee valley power project by the reassuring conciliatory policies adopted by Congress and the Authority with respect to the taxing and regulatory needs of the states. The Act provides that the Board shall pay to the states of Alabama and Tennessee annually five per cent of the gross receipts from the sale of electric power generated in the state.<sup>31</sup> And the Board has, of its own accord, adopted a policy of voluntarily paying to local and state governments an amount which would make its total contribution equal to the taxes it would pay if it were a privately owned utility,<sup>32</sup> and has included in its contracts with municipalities purchasing their own power plants from it a provision that

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29. Municipally owned plants numbered 2318 in 1925, and made up almost 50% of the plants in the country, though producing only a small portion of the power. The plants in Cleveland and Seattle have made particularly good showings. THOMPSON, *op. cit. supra*, note 28. The federal government has run a number of power projects through the Reclamation Service and has succeeded in achieving extremely low rates on a basis of service at cost. See Annual Reports of the Reclamation Service. The Ontario Hydroelectric Power Commission has had extraordinary success. THOMPSON, *op. cit. supra* note 28, at 338-364. The English grid system of transmission lines is publicly owned, as well as two-thirds of the municipal distributing plants. Chazeau, *Electricity Supply in Great Britain*, J. OF LAND AND PUBLIC UTILITY ECON., Aug. 1934.

30. For an investigation of the possibilities of large scale coordination see *A Super-Power System for the Region Between Boston and Washington*, Professional Paper 123 (U. S. Geological Survey, Dept. Int. 1921). Such an undertaking conceivably might be developed by a partnership of municipalities, counties, or states, on the lines of the Ontario system or by contracts similar to the Colorado River Compact, or by mere cooperation. But the practical difficulties in carrying out any general program by such methods would be prohibitive.

31. Tennessee Valley Authority Act, *supra* note 3, § 13. The statute also provides that the Board, with the consent of the President, may revise the percentage, but not more often than once every five years or without allowing a hearing to the states.

32. TVA Press Release, Aug. 23, 1934, at 5; N. Y. Times, Oct. 11, 1934, at 35, col. 6.

they shall do likewise.<sup>33</sup> This policy effectively meets the objection that the revenues of local political bodies will be dangerously reduced by the Authority's exemption,<sup>34</sup> and also that the content of the Authority's "yardstick" does not include this element of private utility costs.<sup>35</sup> Moreover, the Authority has shown a willingness to cooperate with the commissions as well. It has provided data and information requested by the commissions and expressed a desire to cooperate in attaining the mutual objectives of both governmental bodies.<sup>36</sup> And a whole-hearted attempt has been made to eliminate or minimize losses to private industry resulting from the Authority's operations. It has bought existing plants wherever possible instead of building competing lines; it has offered to aid the coal industry in finding new uses for coal; and it has done its business through existing channels instead of setting up its own agencies to serve its needs.<sup>37</sup> Although it is yet too early to evaluate the success of the Tennessee valley experiment, its activities thus far and its program set high standards of responsibility to the public and of cooperation with other public bodies in the development of the valley.<sup>38</sup> These additional practical considerations further strengthen the wisdom of the conclusion that the Authority should be independent of state control and free to carry out the national program without interference.

Established legal principle and precedent, moreover, strongly support this view. The general rule that the states may not hamper or control the activities of the national government is too well settled to be questioned, and is based on the latter's constitutionally declared supremacy.<sup>39</sup> The complete superiority within its jurisdiction of the federal over the state judiciary is an outstanding example of this supremacy,<sup>40</sup> and of course is the basis for its enforcement in other fields. Within the scope of federal jurisdiction, as determined by the federal courts under federal statutes, the powers of the federal courts are supreme, and their decisions and orders not only are immune from interference

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33. See TVA Press Release, April 25, 1934, at 3.

34. Governor Miller of Alabama has agreed that the percentage should be based on wholesale rates. PUBLIC UTILITIES FORTNIGHTLY, Aug. 30, 1934, at 285. Tennessee has already been paid \$40,000. U. S. News, Oct. 15, 1934, at 682, col. 1. Apparently no tax proceeding has been brought against the Authority.

35. See N. Y. Herald Tribune, Editorial, *supra* note 26.

36. See notes 17, 18, 32, *supra*; TVA Press Release, Sept. 18, 1934.

37. See TVA Press Release, Aug. 23, 1934, at 1; *id.* July 18, 1934, and Oct. 15, 1934. The Electric Home and Farm Authority is promoting the sale of privately manufactured appliances through existing selling agencies. TVA Press Release, Aug. 1, 1934, at 4.

38. See TVA Press Releases, Aug. 1, 1934, Sept. 20, 1934, Sept. 27, 1934, and Oct. 2, 1934.

39. *McCulloch v. Maryland*, 17 U. S. 316 (1819). U. S. CONST., Art. VI, § 2. For detailed treatment see Powell, *Indirect Encroachment on Federal Authority by the Taxing Powers of the States* (1918) 31 HARV. L. REV. 321, 572, 721, 932; Cohen and Dayton, *Federal Taxation of State Activities and State Taxation of Federal Activities* (1925) 34 YALE L. J. 807; Brown, *State Taxation of Interstate Commerce, and Federal and State Taxation in Intergovernmental Relations—1930-1932* (1933) 81 U. OF PA. L. REV. 247; Boudin, *The Taxation of Government Instrumentalities* (1933-34) 22 GEO. L. J. 1, 256; Comment (1930) 30 COL. L. REV. 92; Comment (1932) 81 U. OF PA. L. REV. 194.

40. *United States v. Judge Peters*, 9 U. S. 115 (1809).

by the state judiciary,<sup>41</sup> but when directed to state judges must be obeyed by them.<sup>42</sup> Nor have the state courts power to exercise control over the official discretion of other officers or employees of the United States.<sup>43</sup> Similarly state legislatures are forbidden to exert control over the activities and operations of the national government, for neither the criminal<sup>44</sup> nor civil laws<sup>45</sup> of the states may apply to officers and employees of the United States when acting in the course of their duties, while the federal laws on the other hand, are binding on the states.<sup>46</sup> In the field of taxation, however, a different rule has prevailed since 1870, namely, that just as the operations of the national government are exempt from state taxation, similarly the states are exempt from national taxation.<sup>47</sup> The rule was based upon the principle that the state and national governments are independent and distinct sovereignties within their respective spheres and that therefore the two are on a parity as to the concurrent power

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41. *Ableman v. Booth*, 62 U. S. 506 (1858) (writ of habeas corpus issued by a state court to free a person held in custody under such orders of a federal court held void.)

42. Writs of error, certiorari, and mandamus are commonly issued by the federal courts to state judges. See e.g., *Martin v. Hunter's Lessee*, 14 U. S. 304 (1816).

43. *McClung v. Silliman*, 19 U. S. 598 (1821) (state court may not issue mandamus to an officer in the U. S. land office); *Boske v. Comingore*, 177 U. S. 459 (1900) (habeas corpus issued to free United States revenue officer cited for contempt in state court for failure to produce records which the Secretary of the Treasury had ruled were private); *In re Neill*, 17 Fed. Cas. No. 10089, p. 1296 (S. D. N. Y. 1871) (U. S. army officer may not be committed for contempt by a state court for refusing to produce an enlisted soldier in response to a writ of habeas corpus); *Ex parte Shockley*, 17 F. (2d) 133 (N. D. Ohio 1926) (habeas corpus issued to free director of naturalization imprisoned for refusal to obey mandamus of state court).

44. *Tennessee v. Davis*, 100 U. S. 257 (1879) (Congress has power to authorize removal to federal court of a trial of a United States revenue officer for murder under state law); *In re Neagle*, 135 U. S. 1 (1890) (habeas corpus issued to free United States marshal from state custody on indictment for murder); *In re Waite*, 81 Fed. 359 (N. D. Ia. 1897) (state blackmail laws inapplicable to federal pension investigator); *Ex parte Dickson*, 14 F. (2d) 609 (N. D. N. Y. 1926) (imprisonment of United States customs officers on murder charge held improper interference with operations of federal government).

45. *Ohio v. Thomas*, 173 U. S. 276 (1899) (habeas corpus issued to free governor of national soldier's home for issuing oleomargarine in violation of state statute); *Johnson v. Maryland*, 254 U. S. 51 (1920) (state cannot require driver's license from driver of United States mail truck); *Hunt v. United States*, 278 U. S. 96 (1928) (state game laws inapplicable to federal officers acting for the protection of national parks); *Ex parte Willman*, 277 Fed. 819 (S. D. Ohio 1921) (state cannot imprison mail truck drivers for violating regulations regarding headlights). In *Johnson v. Maryland*, *supra*, Justice Holmes conceded the general principle that state laws of general application which incidentally affect the mode of carrying out the employment are valid as to federal officers. But this merely raises the question of congressional intent, and is not a limitation on the constitutional supremacy of the national government. See *United States v. Hart*, 26 Fed. Cas. No. 15,316, p. 193 (C. C. D. Pa., 1817).

46. *Prigg v. Pennsylvania*, 41 U. S. 539 (1842) (Fugitive Slave Act).

47. *Collector v. Day*, 78 U. S. 113 (1870). In this case the Supreme Court held that Congress might not levy a general gross income tax of 5% of any income over \$1000 on the salary of a state probate judge, rejecting the principle of the supremacy of the national government in so many words.

of taxation.<sup>48</sup> Thus the immunity of the federal government based on the principle of supremacy<sup>49</sup> was granted to the states as a necessary implication of the newly found principle of equality. Although this principle has been often applied<sup>50</sup> and is the basis of extensive exemptions from federal taxation, the results reached have not been consistent with real equality.<sup>51</sup>

In order to escape from the full implications of this principle that state and federal governments are equal sovereigns in matters of taxation, the courts adopted a distinction between the "governmental" and "proprietary" functions of state governments, and limited their immunity from taxation to the former. This distinction had originated as a limitation on the rule that a municipal corporation as a division of a state government shares its sovereign immunity from suits for torts of its agents.<sup>52</sup> This and a similar principle to the effect that a state does not impart its sovereign immunity from suit to a corporation

48. As Chief Justice Chase admitted in *Veazie Bank v. Fenno*, 75 U. S. 533, 547 (1869), there are certain reserved powers of the states which it is not competent for Congress to tax, such as the right to pass laws and execute them, because the power to tax involves the power to destroy. This is a necessary implication from the constitution for the preservation of these reserved powers, however, and does not necessarily lead to equality of treatment with the federal government. Nor does it gainsay the supremacy of the federal government, but is merely another constitutional limitation of it. See the dissent of Justice Bradley in *Railroad v. Peniston*, 85 U. S. 5, 48 (1873). The reasons for the two rules are different also, for the national government being the government of all the people levies support from all alike, and whether revenue comes from the people directly or through their delegated agents should make little difference; but state taxation of federal operations is a levy of support by a part from the whole and cannot be anything but unequal. See *McCulloch v. Maryland*, 17 U. S. 316, 435 (1819).

49. See notes 59-64, *infra*.

50. In the following Supreme Court cases a federal tax on a state instrumentality was held unconstitutional. *United States v. Baltimore and Ohio Rr. Co.*, 84 U. S. 322 (1872) (income of municipal corporation); *Pollock v. Farmer's Loan and Trust Co.*, 157 U. S. 429 (1895), *aff'd on rehearing*, 158 U. S. 601 (1895) (income of private persons from bonds of municipal corporations); *Ambrosini v. United States*, 187 U. S. 1 (1902) (stamp tax on bonds given to state by liquor licensee); *Indian Motorcycle Co. v. United States*, 283 U. S. 570 (1930) (motorcycles sold to municipal corporation for police service); *Burnet v. Coronado Oil and Gas Co.* 285 U. S. 393 (1932) (profits from oil lease of state school land). In other cases the rule has been conceded but not applied. *Merchants National Bank v. United States*, 101 U. S. 1 (1880) (10% tax on notes of municipal corporations paid out by banks upheld on ground of supreme national power over currency); *Manhattan v. Blake*, 148 U. S. 412 (1893) (upheld tax on state bank deposits including that deposited by the state generally, as the bank here was not a disbursing agent); *South Carolina v. United States*, 199 U. S. 437 (1905) (tax on state-owned liquor monopoly upheld on the ground that it was a proprietary function); *Flint v. Stone Tracy*, 220 U. S. 107 (1911) (federal corporation tax upheld as to state corporations); *Metcalf and Eddy v. Mitchell*, 269 U. S. 514 (1926) (tax on income of engineer hired by state temporarily to build sewage plant upheld on ground he was not a state instrumentality).

51. See Boudin, *The Taxation of Government Instrumentalities*, 22 GEO. L. J. 1, 256 (1933-34).

52. Cf. Borchard, *Governmental Responsibility in Tort*, 34 YALE L. J. 1, 129, 229, 36 YALE L. J. 1, 757, 1039.

in which it is sole stockholder<sup>53</sup> were made use of by the Supreme Court in *South Carolina v. United States*<sup>54</sup> to support its holding that a state-owned corporation operating a liquor monopoly was not exempt from a national general excise tax, with the result that the "governmental-proprietary" distinction became a limitation on the states' immunity from federal taxation as well.<sup>55</sup> The states of Alabama and Tennessee are now attempting to extend this principle to make it applicable to the federal government as a limitation not only on its immunity from state taxation, but also on its immunity from state control and regulation.<sup>56</sup>

But there is no sound legal basis for such an extension in either case. The federal government has no reserved powers under which it may enter into business as have the states; as a government of limited powers it can constitutionally exercise only governmental functions.<sup>57</sup> But even if the term "proprietary" could be defined to fit some of the activities of the federal government, there is no basis for incorporating the distinction into the rule regarding state taxation of federal agencies. Its existence in the field of tax law can be accounted for only by the necessity for placing a practical limit on the exemption of state agencies from federal taxation by the application of the doctrinal equality rule.<sup>58</sup> To carry over a principle which was used for the purpose of

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53. Cf. *Bank of U. S. v. Planter's Bank*, 22 U. S. 904 (1824); *Briscoe v. Bank of Kentucky*, 36 U. S. 257 (1837); *Darrington v. State of Alabama*, 54 U. S. 12 (1851).

54. 199 U. S. 437 (1905).

55. The incorporation of this distinction into the principle of state immunity from taxation was foreshadowed in a number of decisions of the Supreme Court. As far back as 1869 in the *Veazie Bank Case* (*supra* note 48) the term "governmental" was used as limiting the nature of exempt functions. Again in *United States v. Baltimore and Ohio Rr. Co.* (*supra* note 50) the distinction was discussed, the court holding that the particular act was "within the range of municipal duties" and was therefore exempt. Also in *Ambrosini v. United States*, 187 U. S. 1 (1902) the formula laid down was that only "strictly governmental activities" of state governments were within the rule. Since the *South Carolina* case this has been generally accepted as the formula, and it was expressly approved in *Flint v. Stone-Tracy*, 220 U. S. 107 (1911), and followed in *Ohio v. Helvering*, 54 Sup. Ct. 725 (1934) (state liquor monopoly) and *State of North Dakota v. Olson*, 33 F. (2d) 848 (C. C. A. 8th, 1929), appeal dismissed for lack of jurisdiction, 280 U. S. 528 (1929), in which the federal Capital Stock Tax was held valid as applied to the State Bank of North Dakota, a state owned and controlled corporation (1929) 43 HARV. L. REV. 329.

56. Even though such an extension may be valid in the field of taxation it does not follow that it is so as to the power to control and regulate, for while the power to tax is concurrent and may be exercised by both governments at once on the same subject, the power to control and regulate must by its very nature be exclusive.

57. Apparently the only holding on this question is in *Alabama v. United States*, 38 F. (2d) 897 (Ct. Cl. 1930), in which it was held that when the federal government invaded the field of business enterprise under its constitutional powers, in this case by selling surplus power generated at the Wilson dam, those functions it undertook became immediately public and "governmental" in nature and could not be taxed. The Supreme Court, without discussing the merits, reversed the decision and dismissed the petition of Alabama for lack of jurisdiction of the Court of Claims over the issue. 282 U. S. 502 (1931). See opinion in *Ashwander v. Tennessee Valley Authority*, U. S. D. C., N. D. Ala., Nov. 28, 1934.

58. See the opinion in *South Carolina v. United States*, 199 U. S. 437 (1905). See notes 50 and 55, *supra*, for cases bearing on the point.

sustaining surreptitiously the federal supremacy and to apply it now to deny that supremacy would seem as anomalous as it would be arbitrary. Nor is there any support for such an extension in precedent. State taxation of the property<sup>60</sup> obligations<sup>60</sup> and operations<sup>61</sup> of the federal government is prohibited. Excise taxes on the privileges, occupations, franchises, and operations of federal agencies are also prohibited;<sup>62</sup> but taxation of the tangible property of federal agents has been upheld when the agent was engaged in business for private profit.<sup>63</sup> Taxation of the property of federally-owned corporations, however, whether incorporated under state or federal law, has been held invalid.<sup>64</sup> These decisions were reached in some cases by disregarding the corporate fiction and in others by relying on the principle of agency or trust. Thus it was said that to subject the federal government's property to state taxation simply because Congress has vested the legal title in a corporation which it created for its own convenience, in which it holds all the stock, and to which it furnished all the capital, would be to sacrifice substance to form.<sup>65</sup> And though it was conceded that taxation of the property of an agent is not generally taxation of a federal instrumentality,<sup>66</sup> it was held so here because the sole purpose of the acquisition of the property was the fulfillment of its duty to the federal govern-

59. *Van Brocklin v. Tennessee*, 117 U. S. 151 (1886) (land purchased at tax sale); *Baltimore Shipbuilding Co. v. Baltimore*, 195 U. S. 375 (1904) (contingent interest in drydock); *Lee v. Osceola Improvement District*, 268 U. S. 643 (1925) (public lands).

60. *Weston v. City Council of Charleston*, 27 U. S. 449 (1829) (stocks); *Banks v. Mayor*, 74 U. S. 16 (1868) (certificates of indebtedness); *Bank v. Supervisors*, 74 U. S. 26 (1868) (notes).

61. See *McCulloch v. Maryland*, 17 U. S. 316, 436 (1819).

62. *McCulloch v. Maryland*, 17 U. S. 316 (1819); *Osborn v. United States Bank*, 22 U. S. 738 (1824); *Dobbins v. Commissioners of Erie County*, 41 U. S. 435 (1842); *California v. Central Pacific Rr. Co.*, 127 U. S. 1 (1888); *Flaherty v. Hanson*, 215 U. S. 515 (1910); *Johnson v. Maryland*, *supra* note 45; *Federal Land Bank v. Crosland*, 261 U. S. 374 (1923).

63. This is true whether the agent was incorporated under state or federal law. *Thomson v. Union Pacific Rr. Co.*, 76 U. S. 579 (1869) (federal corporation mortgaged to federal government); *Rr. Co. v. Peniston*, 85 U. S. 5 (1873) (same); *Central Pacific Rr. Co. v. California*, 162 U. S. 91 (1896) (state corporation with federal franchises); *Alward v. Johnston*, 282 U. S. 509 (1930) (on automobiles used by holder of mail contract), noted in (1931) 31 *COL. L. REV.* 899 and (1931) 44 *HARV. L. REV.* 1141.

64. *Clallam County v. U. S. Spruce Production Corp.*, 263 U. S. 341 (1923) (a Washington Corporation); *United States v. City of New Brunswick*, 276 U. S. 547 (1928) (United States Housing Corp., incorporated in New York); *United States v. Coghlan*, 261 Fed. 425 (D. Md. 1919) (Fleet Corp., incorporated in the District of Columbia); *King County, Washington v. U. S. Shipping Board Emergency Fleet Corp.*, 282 Fed. 950 (C. C. A. 9th, 1922); *U. S. Spruce Production Corp. v. Lincoln County*, 285 Fed. 388 (D. Ore. 1922); *U. S. Shipping Board Emergency Fleet Corp. v. Delaware County*, 17 F. (2d) 40 (C. C. A. 3rd, 1927), writ of error dismissed, 275 U. S. 483 (1927), cert. denied, 278 U. S. 607 (1928); *Lincoln County v. Pacific Spruce Corp.*, 26 F. (2d) 435 (C. C. A. 9th, 1928); *United States v. Mayor of Hoboken*, 29 F. (2d) 932 (D. N. J. 1928) (Fleet Corp.). See Comment (1923) 36 *HARV. L. REV.* 737.

65. *King County v. Fleet Corp.*, *supra* note 64.

66. *Thompson v. Union Pacific Rr. Co.*, *supra* note 63.

ment.<sup>67</sup> Although the governmental-proprietary distinction was urged on the courts in a number of cases to uphold the tax, a discussion of the question was generally avoided,<sup>68</sup> and where it was considered, doubts were expressed as to its validity as applied to the federal government.<sup>69</sup> Thus both in the decisions and the dicta there has been a difference of treatment between federally owned and state owned corporate agents in regard to taxation by the other government.

A further extension of this principle so as to permit state regulation of certain agencies would likewise be novel and without legal foundation. No attempt to introduce the doctrine of equality has ever been made in this field, and the federal supremacy has been upheld at every point.<sup>70</sup> The rule that the states may regulate the incidental method of conducting the agents' activities is not a limitation on federal supremacy but a recognition of a possible lack of repugnance between state and federal law.<sup>71</sup> Nor should the fact that the Authority is a separate legal entity have any bearing on the result. For it is even more completely a public servant than any government officer, since it has no private existence at all. The problem of the status of such government-owned corporations has recently become of particular importance because of the increased use the administration has made of the device.<sup>72</sup> The advantages

67. *Clallam County v. U. S. Spruce Production Corp.*, 263 U. S. 341 (1923).

68. Most of the courts said that the property was used for governmental or public purposes without discussing the validity of the distinction. See cases cited in note 64, *supra*.

69. See *United States v. Mayor of Hoboken*, 29 F. (2d) 932, 939 (D. N. J. 1928) and *Alabama v. United States*, *supra* note 57.

70. See cases cited in notes 44 and 45, *supra*.

71. See notes 41-45 *supra*. See also *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 190 (1888) and *Stockton v. Baltimore and N. Y. Rr. Co.*, 32 Fed. 9, 14 (C. C. D. N. J. 1887) to the effect that a state may not exclude or impose conditions on a corporate federal agent.

72. Out of twenty-nine existing examples, eighteen were created by the present administration (each group being counted as one example). The existing corporations created up to March 4, 1933, are as follows: The National Banks, 13 STAT. 100 (1864), 12 U. S. C. A. 21 (1926); the Panama Rr., 32 STAT. 481 (1902); Federal Reserve Banks, 38 STAT. 251 (1913); Alaska Rr., 38 STAT. 305 (1914); Federal Land Banks and Joint Stock Land Banks, 39 STAT. 360 (1916); United States Shipping Board Emergency Fleet Corporation, 39 STAT. 729 (1916), amended by 44 STAT. 1083 (1927) to U. S. Shipping Board Merchant Fleet Corporation; Federal Intermediate Credit Banks, 42 STAT. 1454 (1923); Inland Waterways Corporation, 43 STAT. 360 (1924); Reconstruction Finance Corporation, 47 STAT. 5 (1932); and the Federal Home Loan Banks, 47 STAT. 725 (1932). There were also five temporary war corporations which have gone out of existence. United States Grain Corporation, 40 STAT. 276 (1917); War Finance Corporation, 40 STAT. 506 (1918); United States Housing Corporation, 40 STAT. 594 (1918); U. S. Sugar Equalization Board, 40 STAT. 276 (1917); and U. S. Spruce Production Corporation, 40 STAT. 888 (1918). Under the present administration eighteen more have been created. Tennessee Valley Authority, *supra* note 3; Home Owners Loan Corporation, P. L. No. 43, 73rd Cong., 1st Sess. (1933); Federal Deposit Insurance Corporation, P. L. No. 66, 73rd Cong., 1st Sess. (1933) Sec. 12 B; Central Banks for Cooperatives, Production Credit Corporations, Production Credit Associations, and Banks for Cooperatives, P. L. No. 75, 73rd Cong., 1st Sess. (1933); Federal



of this method of administration in the newer fields which the government is entering are sufficient to assure an increased use in the future.<sup>73</sup> In general these corporations have been held subject to suit in both contract and tort, apparently on the ground of congressional intent.<sup>74</sup> Problems concerning the relations of such corporations with the government are apparently also considered solely a question of legislative intent, as if the corporation were merely an administrative arm of the government.<sup>75</sup> Thus the Authority's status as a government-owned corporation is an argument for rather than against its immunity from state control. From the legal point of view also, therefore, it should be held that the states have no power to tax or regulate the Tennessee Valley Authority.

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Surplus Relief Corporation, P. L. No. 67, 73rd Cong., 1st Sess. (1933); Commodity Credit Corporation, Exec. Order 6340, Oct. 16, 1933; Emergency Housing Corporation, Exec. Order 6470, Nov. 29, 1933; Electric Home and Farm Authority, Exec. Order 6514, Dec. 19, 1933; Federal Subsistence Homestead Corporation, P. L. No. 67, 73rd Cong., 1st Sess. (1933) Sec. 208; Federal Farm Mortgage Corporation, 12 MASON'S U. S. CODE SUPP. No. 3, § 840-7a, Jan. 31, 1934; Export-Import Banks of Washington, Exec. Orders 6581, Feb. 2, 1934, and 6638, Mar. 9, 1934; Tennessee Valley Associated Cooperatives, incorporated Jan. 24, 1934, TVA Press Release, May 18, 1934; Federal Credit Unions, 12 MASON'S U. S. CODE SUPP. No. 3, § 1751, June 26, 1934; Federal Savings and Loan Insurance Corporation, 12 MASON'S U. S. CODE SUPP. No. 3, § 1724, June 27, 1934; and National Mortgage Association, 12 MASON'S U. S. CODE SUPP. No. 3, § 1716, June 27, 1934. Seventeen of those now existing are wholly government owned and controlled, and all are federal agencies and exempted in some respects from state taxation.

73. The freedom from the bureaucratic system of detailed annual appropriation, the government auditing system, civil service restrictions, and rules regarding government contracts, and the possession of its own credit facilities, free it from congressional interference and political pressure, and contribute flexibility of organization and policy and fluidity of financial resources. See VAN DOREN, *GOVERNMENT OWNED CORPORATIONS* (1926).

74. *Sloan Shipyards Co. v. U. S. Shipping Board Emergency Fleet Corp.*, 258 U. S. 549 (1922), noted in (1923) 32 YALE L. J. 283. See Note (1924) 8 MINN. L. REV. 427, and Note (1932) 32 COL. L. REV. 881. Some courts have given as an additional reason the fact that the corporation was engaged in a commercial enterprise. *Gould Coupler Co. v. U. S. Shipping Board Emergency Fleet Corp.*, 261 Fed. 717 (S. D. N. Y. 1919); *Federal Sugar Refining Co. v. U. S. Sugar Equalization Board*, 268 Fed. 575 (S. D. N. Y. 1920).

75. The Fleet Corporation gets the benefit of preferential telegraph rates allowed to government departments, *U. S. Shipping Board Emergency Fleet Corporation v. Western Union Telegraph Co.*, 275 U. S. 415 (1928), and fraudulent claims against it are criminal. *United States v. Walter*, 263 U. S. 15 (1923). See notes cited in note 74, *supra*, and McGuire, *Government by Corporations* (1928) 14 VA. L. REV. 182; Schnell and Wettach, *Corporations as Agencies of the Recovery Program* (1934) 12 N. C. L. REV. 77; Comment (1934) 28 ILL. L. REV. 1082.